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ABSTRACT

The monograph reviews legal principles derived from state and federal statutes, constitutions, and court cases (table listing over 350 cases is included) regarding the education of handicapped children. Following an executive summary, an introduction explains the scope of the booklet and lists the major sources of the rights of handicapped students. In subsequent sections, the following topics are addressed: substantative rights (federal constitutional sources, a free appropriate public education, individualized education programs, related services, the least restrictive environment, costs, sports, and access); procedural rights (informal dispute resolution, prior notice, evaluation procedure, and special considerations in discipline); and remedies (fund withholding, individual lawsuits). A concluding chapter summarizes common themes in special education laws, briefly recounts the impact of P.L. 94-142 on state governments, and notes the existence of state special education statutes as alternative legal sources of education rights for handicapped children. (Concluding the document are 448 footnotes, most of which reference either specific legislation or court litigation and tables showing the education clauses in state constitutions, state constitutional providions for equal treatment, right to an appropriate education under state statutes, and a comparison of state special education statutes. (CL)

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Christiane Hyde Citron

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Executive Summary

The extensive legal rights of handicapped students derive from different tiers of laws — federal and state constitutions, and federal and state statutes. Because of the dramatic development of these rights in the last decade, there has been too little time to clarify the independent scope of each source of law. This booklet discusses important common principles of many state statutes and P.L. 94-142, as well as Section 504 on occasion. Perhaps the most basic principle to emerge from special education law is the right to individualized determinations based on actual abilities and needs.

Shared themes of special education law include the right to a free appropriate public education, the right to related services including health services and private school placements, the right to be educated in the least restrictive environment, the right to physical access to education programs, and the right to an unbiased evaluation process. A handicapped child has the right to receive an extended school year if his or her individual needs require it. Likewise, the child is entitled to an individual evaluation of whether he or she is capable of participating in school sports programs. Tests used to evaluate handicapped children must be validated, and adequate notice about the testing must be given. A key facet to any of these rights is that certain procedural safeguards must be provided. In sum, notice and an opportunity for a hearing must be given, and scrupulous fairness insured in any administrative proceedings that follow.

There are a variety of remedies available to enforce these rights. Although fund-withholding is a possible sanction under both federal statutes and some state statutes, it is rarely invoked. The handicapped child has frequently obtained injunctive relief under various statutes, but monetary damages are usually denied. Generally, administrative procedures must be exhausted before the courts will consider the matter.

Alternative legal sources of education rights for handicapped children at the state level are especially important, since the future of federal statutes is uncertain. Even if the landmark federal legislation of the seventies were to be restricted or repealed, handicapped children would still possess substantial procedural and substantive rights under state and federal constitutions, and state statutes. Current political and fiscal considerations may produce more of an emphasis on state law. The vast majority of expenditures for education of the handicapped are made with nonfederal funds.

State special education statutes provide many of the same protections afforded by federal statute, but contain substantial disparities and ambiguities. The variation in scope among the statutes is significant. The different statutes apply to different populations as well. Some state statutes, like P.L. 94-142, provide some education services that might be called "affirmative action." In addition, nearly every state provides at least limited civil rights protection potentially available to handicapped students. A few state statutes, like Section 504, prohibit discrimination in education programs. The state statutes as a group provide fewer procedural protections than P.L. 94-142. And, a number of the state statutes do *not* reflect all the shared themes discussed above.

Finally, constitutional provisions at both the state and federal level may play an increasingly significant role in assuring handicapped children equal educational opportunities, because some state special education laws may themselves be weakened in the aftermath of federal cutbacks. The state education clauses, in particular, provide an important minimum guarantee of *some* public education to handicapped children. Although there is no federal constitutional right to education, federal and state equal protection and due process clauses set outside parameters for fairness and equity in public treatment of the education of handicapped children.

Although the precise lines of these constitutional parameters have yet to emerge, some general rules are clear. As noted above, the Constitution prohibits treatment of handicapped children based on stereotyped assumptions. Likewise, handicapped children are entitled to notice and opportunity for hearing before any significant change in their education — from the initial classification as handicapped, to any disciplinary action affecting their placement. Likewise, the Constitution mandates fairness in any of these procedures, and forbids determinations tainted by racial or cultural bias.

I. Introduction

> *Today education is perhaps the most important function of the state and local governments. . . . [W]here the state has undertaken to provide it, [it] is a right which must be available to all on equal terms.*
>
> *— U.S. Supreme Court*
> Brown v. Board of Education[1]

Before the civil rights movement of the 1960s, most handicapped children were excluded altogether from the public school system in America.[2] Their plight was similar to that of black children who faced legally sanctioned discrimination as a routine fact of life. For handicapped children, as for black children, the U.S. Supreme Court's decision in *Brown v. Board of Education* marked a conceptual turning point; it recognized and defined a national goal of equality for all. The constitutional rights of handicapped children incipient in *Brown*[3] became a subject of political controversy and litigation by the late 1960s. Out of this controversy, handicapped children have entered the public school system and legal principles have begun to emerge.

The Scope of the Booklet

This booklet reviews these principles, which in our federal system, are derived from state and federal statutes and constitutions. The purpose of the booklet is to serve as a resource to state officials and others who seek relatively comprehensive and detailed information on the rights of handicapped children. It should also facilitate interstate exchange of information concerning different states' approaches to shared problems and concerns. Such exchange of information enables states to act as laboratories for social experimentation, and to assess the results of various approaches for their own use.

This booklet is based primarily on an analysis of statutes, rather than administrative regulations, for several reasons. Practical limitations prevented an examination of administrative regulations for all 50 states. Also, regulations are most vulnerable to change, and, legally should track the statutory language, only providing detail not found in the statute. The rights to education analyzed in this booklet are divided into substantive rights (Chapter II) and procedural rights (Chapter III), although the two merge at many points. Generally, discussion of each cluster of rights includes an analysis of its constitutional underpinning, if any. The discussions generally show judicial attention has focused on statutory rather than constitutional law, because the judiciary strongly prefers to avoid ruling on a constitutional basis. *Federal* statutory law is analyzed at length because of its broad application. Also, plaintiffs more often sue on the basis of federal law in federal court, possibly because of a preference for federal judges over state judges.[4] As federal analysis of an issue often becomes a model for state analysis of the same issues, discussion of state statutes is integrated into the discussion of federal law throughout the booklet. The booklet attempts to provide an overview of state special education laws, rather than a detailed review of each state's law.

The future of education rights of handicapped children will necessarily be affected by nonlegal considerations, such as fiscal, political and programmatic factors. This broader social context in which legal rights exist is generally beyond the scope of this booklet. Likewise, the booklet generally does not examine the implementation of these laws, other than as tested in court decisions. The various approaches are not assessed from the point of view of education theory. Nor does the booklet examine the individual rights of children outside of schools.

The focus of this work is on youths below the age of 21 in elementary and secondary education. The term "child" covers this entire group. Many of the generalizations about this population will pertain as well to handicapped students in postsecondary education. The term "parent" includes any legal guardian. The term "handicapped" is used in the most inclusive sense; different laws provide differing definitions for "handicapped." The term "state" includes the territories as well as the 50 states.

Major Sources of Rights

The rights of handicapped students are derived from a mosaic of laws. First and foremost, the equal protection and due process clauses of the fourteenth amendment to the U.S. Constitution provide nearly permanent protection for all handicapped students in every state. Second, virtually every state constitution contains a due process clause, and most state constitutions provide for equality among individuals. Third, every state constitution has language assuring some right to education.

In addition to these constitutional protections, over the past decade, handicapped children have obtained expanded rights from statutes. All 50 states have enacted their own special education statutes. Public attention has focused on Congressional passage of Section 504 of the Rehabilitation Act of 1973 (Section 504)[5] and the Education for All Handicapped Children Act of 1975 (P.L. 94-142),[6] but the current Administration has proposed major changes to these laws. If federal requirements were weakened, handicapped students would turn to the relatively new state statutes. Their terms would undoubtedly become the subject of more litigation. Nonetheless, federal decisions will continue to be universally useful, as a federal court's construction of a statutory term, such as "appropriate education" often influences state judges who must construe the same term under state law.[7]

Some of these state statutes are extremely far-reaching, while others are quite modest. Some are very prescriptive, while others are general, even vague. Of course, these statutes may weaken if P.L. 94-142 is repealed; political currents that affect national decisions also affect states. However, powerful lobbying groups for handicapped children at the state level, together with court decisions, have made repeal less likely. While there is evidence that states are committed to the handicapped,[8] knowledgeable observers believe that some state laws could be modified significantly in the wake of changes in federal legislation.[9]

In any case, state and federal laws have endured thus far, and school officials who attempt to comply with their terms will avoid unnecessary litigation. An understanding of the rights of handicapped children, as established in the multiple sources of law, is an important step toward the practice of preventive law.

II. Substantive Rights

Federal Constitutional Sources

A lower state court in Utah in 1969 was one of the earliest to recognize the constitutional rights of handicapped children.[10] However, the public did not focus on these rights until a few years later. In 1972, Pennsylvania and the District of Columbia were both placed under federal court orders to provide handicapped children with access to publicly-supported education in *Pennsylvania Association for Retarded Children v. Pennsylvania*[11] (*PARC*) and *Mills v. Board of Education*[12] (*Mills*). These two cases have been interpreted to establish a strong set of constitutional rights, based on the equal protection and due process clauses of the fourteenth amendment to the federal Constitution.[13] In both cases, courts required school systems to admit previously excluded handicapped children and to provide them with hearings and review procedures upon any change in their educational classification. However, the decrees are consent decrees, which are not always trusted as precedent. Also, *Mills* could have rested on local statutory and regulatory grounds,[14] and in *PARC* the court cautioned that the full parameters of the constitutional claims were not decided.[15]

Thus, *PARC* and *Mills* do not provide unequivocal legal precedent,[16] and the scope of the rights of handicapped students is not firmly established as a matter of federal constitutional law.[17] In the intervening decade, the significance of the Constitution to handicapped students has been largely academic, due to the passage of major statutes[18] and federal legislation. Litigation over education claims has naturally tended to focus on statutes, which are relatively clear and comprehensive, when compared to constitutional provisions. Courts traditionally avoid deciding constitutional issues whenever alternative bases exist for decisions.[19] Nonetheless, courts sometimes refer to the Constitution as a potential basis for their decisions. Even the Supreme Court has hinted at this, at least for minimal access to education by the handicapped, in *Board of Education of Hudson Central School District v. Rowley*.[20] Constitutionally-based rights remain minimal requirements for all states, regardless of state law or state participation in federal funding programs.

Equal Protection: Rules for Analysis

The fourteenth amendment sweepingly forbids states from denying "any person . . . equal protection of the law." The Supreme Court has partially supplied the detail. For example, the Court has made it clear that only *intentional* discrimination violates the equal protection clause; unintentional discrimination does not.[21] Proof of intent is difficult to establish, although circumstantial evidence can be used to infer an intent to discriminate.[22] Some legal claims by handicapped children have recently suffered setbacks because of this proof requirement.[23]

The Court has developed a set of "tests" to determine whether a violation has taken place. There are three judicial tests that apply. First, the Supreme Court has traditionally interpreted the equal protection clause as allowing some unequal treatment among classes of persons — if shown to be justified. These differences in treatment, or classifications (such as differences between primary and secondary school students), need only be justified by a "rational basis."[24] Judges and attorneys call this approach the "rational basis" test.

Under certain circumstances, however, policies requiring differential treatment of classes of persons will be reviewed under a second, much more exacting legal test. Where a classification is suspect (such as one based on race), or where a fundamental right is at stake (such as free speech or free exercise of religion), courts strictly scrutinize the government's justification for the unequal treatment. When applying strict scrutiny, courts require the state to justify unequal treatment by establishing a compelling state interest. Mere rationality is not enough. It is much harder for a state policy to withstand strict judicial scrutiny.

Neither the nature of the right nor the nature of the classification would seem to require strict judicial scrutiny of most distinctions among handicapped and nonhandicapped students, other than outright exclusion from the public school system. The Supreme Court in *San Antonio Independent School District v. Rodriguez* (*Rodriguez*),[25] a school finance case, ruled that education was not a fundamental right under the federal Constitution. The Court indicated that to be fundamental, the Constitution must articulate the right explicitly. The U.S. Constitution contains no reference to a right to education. State constitutions, on the other hand, *do* contain education clauses. Consequently, state constitutional analysis of education rights differs from the federal analysis and merits separate consideration below.

The Supreme Court has not decided whether classifications on the basis of handicap are suspect. Thus far, it has found suspect only those classifications based on race, alien status,[26] and national origin. However, lower courts disagree on whether handicapped children should be considered a suspect class.[27] Some courts have noted that distinctions based on race and handicap are analytically different.[28]

This does not necessarily mean that mere rationality will justify discriminatory treatment of handicapped students. In June 1982, a majority on the Court clearly accepted a third, hybrid level of review in a sex discrimination case.[29] States must show "an exceedingly persuasive justification" for classifications based on sex and that they are "substantially related to the achievement of those objectives."[30] Also, in a 1982 case involving total exclusion of undocumented alien children from education services, a majority of the Court also appeared to apply this middle-tier review, emphasizing the importance of the right affected.[31]

It is not yet clear which kinds of classifications will trigger this third level of review, but those that involve a class in need of protection (because of historic discrimination based on that classification) may qualify. Differing treatment of handicapped children based only on unsupported assumptions could be subject to this middle level judicial review.[32]

The judicial test applied is extremely important to the outcome of a case. Plaintiffs virtually always win when policies are subjected to strict scrutiny. They seldom win when any rational basis will justify a difference in treatment, because the state can easily defend the rationale of its policy. The outcome is harder to predict where the new hybrid test is required.[33]

Application of Equal Protection Analysis

Absolute exclusion of handicapped children from education would be unconstitutional because it lacks even a rational basis. The courts in *PARC* and *Mills* found it totally irrational to exclude handicapped children, convinced by expert testimony that *all* children are capable of benefiting from *some* education.[34] They reasoned that if all children can benefit, it would be irrational for a state to deny education to some of them. The Supreme Court in *Rodriguez* noted that there existed a distinction under the federal Constitution between complete exclusion and "only relative differences in spending" levels on education.[35]

Other differential state treatment of handicapped students by school officials, short of total exclusion, is more difficult to analyze. The U.S. Constitution does not give handicapped children a right to an *appropriate* education.[36] Thus, when the education provided to different groups of children varies only by degree, the courts are likely to find the state's policy to be rationally based. Further, distinctions among children with different kinds of handicapping conditions may be easier to justify than distinctions between handicapped and nonhandicapped children. For example, blind and deaf children have historically been given favored treatment over other handicapped children. The highest court of New York upheld this favoritism, finding that it had a "rational basis."[37] Also, courts have allowed New Hampshire to give funding priority to severely handicapped children,[38] and Ohio to give funding priority to training handicapped individuals with greater intellectual capacity.[39] (P.L. 94-142, however, now requires participating states to serve all "handicapped children," and "regardless of the severity of their handicap."[40])

Unlike other differences in treatment of handicapped children, placement decisions that affect minority children disproportionately may violate the equal protection clause. Misclassification on the basis of culturally biased tests is unconstitutional. In *Hobsen v. Hansen*, the court held that the "tracking" of students into classes for the educable mentally retarded on the basis of culturally biased tests violated their right to equal educational opportunity.[41] Courts regard such errors, leading to inappropriate placement of children, as "clearly an educational tragedy."[42] Thus, tests used to evaluate children for placement must be validated as a reliable predictor of the characteristic sought to be measured.[43] Once a disproportionate racial impact of tests is shown, the school district bears the burden of showing that tests are valid for the purposes used, "segregating students according to their ability to learn in regular classes."[44] In *Larry P. v. Riles*, where the state failed to meet this burden, the court concluded that California school officials intentionally discriminated against black children, in violation of the equal protection clause.[45]

In sum, even though the Supreme Court has never ruled on the constitutional rights of handicapped children to education, analysis based on the equal protection clause establishes significant protections for these children. However, equally significant limitations on that protection have also developed.

Substantive Due Process

The due process clause protects individuals against arbitrary or unreasonable government action. Thus, the Supreme Court recently ruled that due process requires that involuntarily-committed mentally retarded persons receive training. In *Youngberg v. Romeo*, the Court found a fourteenth amendment right, based on substantive liberty interests, not to be confined without "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[46] In the past decade a number of lower federal courts had found a right to treatment for retarded persons involuntarily committed to institutions,[47] but *Youngberg* marks the first time the Supreme Court has considered the substantive rights of retarded persons under the fourteenth amendment.

However, the Supreme Court emphasized that the "liberty interests" involved are not absolute, and that legitimate state interests (including fiscal and administrative burdens) must be balanced against the interests of the individual. Qualified professionals must determine what is a "reasonable" amount of training and their decisions will be presumptively valid in any court challenge. It is uncertain how *Youngberg* would apply to institutionalized handicapped students. At the least, those who have been involuntarily committed have a constitutional right to receive some form of training.

Concepts of substantive due process have not been a major source of rights for handicapped students. Courts generally have been reluctant to apply substantive due process analysis, because of its undefined nature. They are more likely to turn to the relatively well-developed precedent under the equal protection clause.[48]

State Constitutional Sources

State education and equal protection clauses also may affect how courts treat classifications of handicapped children. Some state courts have ruled that education is a fundamental right under the state constitution; others have ruled to the contrary. As discussed above, if education is considered to be a fundamental right, then classifications affecting that right will be subject to an especially demanding scrutiny by the courts. The education clauses in the state constitutions appear in Table I at the conclusion of this booklet; the equality provisions appear in Table II. With one exception (Mississippi), all state constitutions require the state to maintain public schools.[49]

Although the language of the education clauses differs from state to state, there are some general patterns. Over half the states specify a system of free education for all children. For example, the Nebraska Constitution provides, "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."[50] A number of states use the term "common schools" which is considered synonymous with free public schools.[51] Some clauses use language such as a "uniform" or a "general and uniform" school system. Some do not extend rights to education to *all* children, although such rights are clearly implied. A quarter of the education clauses require "thorough and efficient" education, or specify similar qualitative terms. For example, in New Jersey the legislature must "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years."[52] Some states specify a "general and efficient" (*e.g.*, Delaware) or "thorough and uniform" (*e.g.* Colorado), or just "efficient" education be provided (*e.g.* Texas).[53] A few states follow no constitutional model but their own.[54] New Hampshire is an example: "It shall be the duty of the legislatures and magistrates, in all future periods of this government, to cherish the interest of literature and sciences, and all seminaries and public schools."[55]

In at least a quarter of the states, courts have expressly held that education is a fundamental right, and have applied strict scrutiny where education rights are impinged,[56] but many courts have refused to do so.[57] In *In re. G.H.* the North Dakota Supreme Court found a fundamental right to education in jeopardy, and required compelling justification from the state. The state failed to produce any interest important enough to override the interest of the child in equal education opportunity.[58] A few states have recognized a similar right without considering whether it is fundamental[59] and have ruled in favor of the child. On the other hand, the highest court of New York State has upheld, as merely rationally based, the state's requirement that parents pay some costs of educating their mentally retarded children, while parents of other children do not have to pay such costs.[60]

State equal protection clauses are also important. Some state courts may follow the lead of the U.S. Supreme Court and subject sensitive classifications affecting obviously important interests to more careful review (such as the new middle-tier review). Under such an approach, it would be very difficult for schools to prove "an exceedingly persuasive justification"[61] for some classifications of handicapped students. In two states, constitutions also broadly protect the civil rights of handicapped persons.[62] Thus, in Florida and Massachusetts, classifications based on handicap would trigger strict judicial scrutiny, independent of the requirements of the education clause.[63]

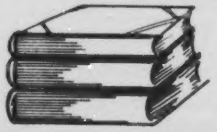
On the other hand, the Delaware Constitution *excludes* physically and mentally disabled children from its education provision. In response, the Delaware Supreme Court has applied the federal equal protection clause to require that all handicapped children receive a free public education.[64] It is possible for a state court to impose such exclusions by judicial construction,[65] but federal law must not be ignored. Another state court, in New Jersey, found that the "habilitation" needed by institutionalized profoundly retarded children was *not* a component of the fundamental right to education and permitted the state to charge parents for some of the costs of institutional care.[66]

Finally, several state constitutions contain a general prohibition against discrimination in education institutions.[67] Several state constitutions provide that a "goal" of their education system is to "develop the full educational potential of each person."[68] Some require public support of education institutions for the handicapped.[69] Usually, the latter refer to "the insane, blind, deaf and dumb."[70]

In sum, if all the statutory rights of handicapped children suddenly disappeared, every state would still continue to have obligations to handicapped children based on constitutional law. The federal Constitution and most state constitutions offer varying degrees of protection to these children. Eventually, if statutory protection eroded, the situation of these children would resemble that of needy students in the school finance cases. In these cases, relief is not easily won in federal courts, while state courts offer more of a chance,[71] because they contain provisions for education rights.

Statutory Sources

Scope in General



The following discussion first outlines the major statutes, and then analyzes the major components of *substantive* rights of handicapped children based upon these statutory sources. Procedural rights will be analyzed in Chapter III. Inevitably, some rights defy categorization as substantive or procedural. For example, although both federal statutes give handicapped students a right not to be punished for their handicap (a substantive right), the manner in which discipline is performed raises procedural issues.

Because handicapped students usually make their education claims on the basis of *both* federal statutes, Section 504 and P.L. 94-142, the courts often fail to make analytical distinctions between the two. Although both laws provide a right to education that can be enforced through termination of federal funds, differences in the statutes abound. Perhaps the most fundamental distinction between the two overlapping laws is that while P.L. 94-142 mandates particular treatment for handicapped children, Section 504 requires only that handicapped children receive the same quality of education that other children receive, be it excellent, adequate or inadequate. Thus, of the two, P.L. 94-142 provides the greatest detail on education rights for the handicapped. Section 504 is an antidiscrimination law that applies to all federally funded programs. On the other hand, P.L. 94-142 is, at least in form and structure, a funding program, and state participation is elective. New Mexico is the only state that has not participated in P.L. 94-142, but it remains liable under Section 504 as it receives federal funds for other programs.[72] Finally, Section 504 does not impose a supervisory role on a state education agency, while P.L. 94-142 requires that states take certain organizational steps.[73]

Section 504 has been viewed as a codification of the equal protection clause[74] and was patterned after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[75] The heart of Section 504 provides "No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in . . . any program or activity receiving Federal financial assistance."

Despite its origin as an outgrowth of the civil rights movement,[76] Section 504 is analytically distinct from traditional civil rights laws because Congress limited its protection to those who are "otherwise qualified." Unlike the absolute bar on racial discrimination in the Civil Rights Act of 1964, Section 504 prohibits discrimination only against those qualified for a given program or position. The U.S. Supreme Court, in *Southeastern Community College v. Davis*[77], ruled that a nursing school did not violate Section 504 by refusing to admit a deaf woman into its nursing program where her deafness prevented her from being "otherwise qualified" for the program.[78] Underlying Section 504, then, is the notion that some classifications based on handicap are legitimate.

Courts will accept such classifications when a "substantial justification" is shown for them.[79]

The Supreme Court has not yet ruled on several important ambiguities about Section 504. Two of these may be especially significant to the outcome of claims asserted by handicapped students: whether intent to discriminate is required, and whether the statute's scope is "program-specific" within federally funded agencies. Intent to discriminate is required under the equal protection clause and most federal civil rights statutes,[80] but lower courts have not required it under Section 504;[81] both "de jure' (intentional) and "de facto" (unintentional) discrimination are illegal under Section 504.[82]

Second, the lower courts disagree on whether Section 504 applies only to the specific programs receiving federal funds, or instead to the entire institution that receives federal funds.[83] One lower court found it "absurd" for a high school receiving federal funds to argue that its athletic programs should not be subject to Section 504 because they were not federally supported.[84] On the other hand, the Supreme Court has just ruled that Title IX of the Education Amendments of 1972 is "program specific,"[85] without defining what constitutes a "program." Since Section 504 was modeled on Title IX, its scope may also be affected.

P.L. 94-142 was enacted to ensure that states provide "a free appropriate public education" for handicapped children, "regardless of the severity of their handicap."[86] Significantly, the act does not mandate any particular education program for handicapped children, but establishes a process designed to meet each child's unique education needs. The statute adopts "mainstreaming" as its education philosophy: it requires that "to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped. . . ."[87] The law requires states to assure comprehensive procedural safeguards concerning the evaluation and placement of handicapped children, and imposes ultimate responsibility for all of these provisions on the state education agency.[88] Finally, it gives "the right to bring a civil action" in state or federal court to anyone dissatisfied with a placement or evaluation.[89]

Every state has a special education statute, as shown on Table IV, at the conclusion of this booklet. Many of these statutes track P.L. 94-142 closely, and spell out the education rights of handicapped students. About two-thirds of the statutes specify some variant of an "appropriate" education for handicapped children. About half of the states specify some sort of administrative appeal process for placement or evaluation disputes. Other states do not follow P.L. 94-142, and take a less prescriptive statutory approach, apparently relying on constitutional provisions to provide basic legal rights. Many statutes leave major substantive, procedural and enforcement issues to be handled by administrative regulation. An important feature of the state statutes as a group is their frequent lack of clarity in intent and terms; confusion in some statutes comes from verbosity, while others are short and cryptic.[90]

Taken as a whole, state statutes provide substantial rights, but do *not* provide the same degree of protection as P.L. 94-142. The disparity among state *statutes* has less pragmatic significance now than it would if P.L. 94-142 did not exist as a base line for participating states. Every state except New Mexico participates in P.L. 94-142, and has promised to abide by its terms. Often these terms are incorporated into administrative regulations or state plans, rather than statutes.

State civil rights statutes are another source of substantive rights for handicapped students. Almost every state has at least one civil rights statute that prohibits discrimination against handicapped persons in places of public accommodation, although some are available only to blind persons with guide dogs. Generally, the state protection is much more limited than that provided by Section 504. Although some state civil rights laws provide protection similar to Section 504, others are very limited in scope. To date, these laws have played an insignificant role in litigation by the handicapped, perhaps because of major legal questions about their scope. The state civil rights statutes are analyzed below in the discussion of access to facilities and civil rights protection.

The Population Protected

The various statutes protect different populations. For instance, not all persons who are considered "handicapped" under Section 504 are "handicapped" under P.L. 94-142.[91] State laws may also define the eligible population differently. P.L. 94-142 covers "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, *who by reason thereof require special education and related services.*"[92] P.L. 94-142 regulations specifically restate this point.[93] Children who need physical help in getting into the classroom, for instance, but do *not* need special instruction once there, are *not* protected by P.L. 94-142. Nonetheless, most courts have glossed over the limiting language and have assumed that if a child has a handicapping condition, then he or she is a "handicapped child" and protected by P.L. 94-142.[94] P.L. 94-142 does not permit any child to be regarded as too severely handicapped to be served.[95] Finally, P.L. 94-142 also applies to all handicapped children within a state, including those attending private schools,[96] as well as those incarcerated for criminal offenses.[97]

Section 504's definition of a handicapped person is extremely broad. A handicapped person, according to this law, is one who has a physical or mental impairment that substantially limits one or more of such person's major life's activities; or has a record of, or is regarded as having, such an impairment.[98] Thus, a physically handicapped child who is not covered by P.L. 94-142 (because he or she does not require special education) nevertheless has a strong case for access to facilities under Section 504.[99] State civil rights statutes also protect different populations than Section 504.[100]

State special education statutes also serve different populations from P.L. 94-142. While P.L. 94-142 requires participating states to serve children from age 5 through 18, it allows state variation for ages 3 to 5, and 18 through 21.[101] If a child has *not* received the education he is entitled to during the core period, a court may order that his education be continued beyond the usual age limit.[102] A number of state special education statutes provide for educating handicapped children from birth, such as California, Iowa, Michigan, Nebraska and Oregon.[103] Some, such as Iowa, provide for education beyond age 21 under certain circumstances.[104] A number of statutes permit, but do not require, education of children below the age of 5.[105] Such preschool assignment is often left to the discretion of the local school board.[106]

Some observers have discerned a state trend toward narrowing the covered age range.[107] One federal study found a greater percentage of unserved handicapped children among the oldest and youngest groups.[108] And, another more recent report to Congress has concluded that there are disparities between the states in access to special education, and that "the State in which the handicapped child lives affects whether or not the child has access to special education."[109]

The definition of exceptionality varies greatly from state to state.[110] Many state special education statutes apply to gifted children,[111] while P.L. 94-142 does not. Where the gifted are included within the definition of those requiring special education, a court will require special services for such children.[112] As a recent report to Congress observed, the "diagnostic practices and definitions of handicapping conditions vary widely *within* and among States and can lead to both the under- or over-identification of children within a school district."[113] Thus, these various statutes provide protection to substantially different populations. A handicapped child who is protected in one state would not necessarily be entitled to the same protection under a different state's special education statute.

A Free Appropriate Public Education

> *[T]he intent of the Act [P.L. 94-142] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.*
>
> *— U.S. Supreme Court*
> Board of Education of Hudson
> Central School District v. Rowley

P.L. 94-142 provides no detailed guidance on the term "appropriate education," but it requires:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.[115]

The law relies primarily on process — joint parent/educator planning, through development of a written "individualized education program" (IEP) for each child identified as needing special education.[116] In light of this deliberate flexibility and lack of statutory guidelines as to the content of "appropriate," it was probably inevitable that the concept would become the subject of litigation. The efforts of many courts to give content to this amorphous term have resulted in conflicting views.[117]

In June 1982, the Supreme Court clarified the term "appropriate," declaring that "appropriate" education "did not mean a potential-maximizing education," in *Board of Education of Hudson Central School District v. Rowley.*[118] The lower courts had ruled that the school board must provide a deaf child with a sign language interpreter (even though she had been performing above the average of her class without one), reasoning that "appropriate" meant an education that allows a child to reach full potential (in this case a performance level comparable to that of children of superior intellect). The school had already made various special arrangements for the child, including instruction for an hour daily from a tutor for the deaf and from a speech therapist for three hours each week, provision of an FM hearing aid, and installation of a special teletype communication machine. The Supreme Court found that "appropriate" meant a basic floor of opportunity, and chastized the lower courts for judicial intrusion into the education policy process.[119]

The result of *Rowley* is substantial deference to school policies, within the parameters of the law.[120] The Court specifically rejected the idea of " 'equal' educational opportunities" as the standard for appropriateness,[121] despite language in the statute noted by the dissent, which "itself announces it will provide a '*full* educational opportunity to all handicapped children.' "[122] The *Rowley* Court interpreted P.L. 94-142 to require only "equal access,"[123] not "strict equality of opportunity or services."[124] No "particular substantive level of education" is mandated.[125] If a child is benefiting from a properly adopted program, a court is not free to set aside the program.

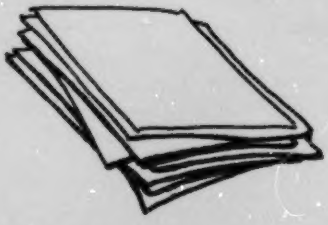
All that a court must ascertain is whether the P.L. 94-142 procedural safeguards have been followed, and whether the child's individualized educational program is "reasonably calculated to enable the child to receive educational benefits."[126] This inquiry is much more circumscribed than that made by most lower federal courts prior to *Rowley*. These courts had attempted to compare the quality of the handicapped child's program to that of nonhandicapped children. Most of those courts had appeared uncomfortable making these kind of comparisons, even with expert testimony to guide them.[127] Where judges were required to ascertain the gap between a handicapped child's performance and potential, then compare that gap to that of nonhandicapped children, as the lower court had done in *Rowley*, the task became almost overwhelming.[128] Although the Supreme Court did not mention any other lower court decision concerning an appropriate education, it seemed aware of how those courts had been drawn into evaluating conflicting approaches to educational programs when it cautioned against just this.[129]

Despite *Rowley*, a challenge based upon Section 504 would still turn upon the comparison of services available to the handicapped and the nonhandicapped. Therefore, since nonhandicapped children have no entitlement to an "appropriate" education, there is no reason why Section 504 would give handicapped children such an entitlement.[130] The regulations adopted under Section 504 require that handicapped children receive "a free appropriate education," which is "designed to meet the individual needs of handicapped persons *as adequately as the needs of nonhandicapped persons are met. . . .*"[131] The regulations appear to use the term "appropriate" to include even an inadequate education, if that is what nonhandicapped children receive. However, several lower courts have rejected the idea that plaintiffs have to allege or prove what level of education nonhandicapped children receive, finding a "presumption . . . that normal school age children are provided with adequate educational services appropriate to their needs."[132]

Approximately two-thirds of the states specify in their special education statutes that handicapped children are to receive an "appropriate" or "individualized" education, as shown in Table III. This language should not necessarily be equated with the federal concept of "appropriate." Some of these statutes require an education commensurate with the needs of the child. Some require maximizing the child's capabilities. A handful use "suitable" or "proper" or similar descriptions of the nature of the handicapped child's education. A few state statutes do not specify the nature of education to be provided to the handicapped, although the matter often is covered in administrative regulations or procedures in those states.

Although *Rowley* is not technically precedent for construing the term "appropriate" in state statutes, it is likely to influence state courts.[133] However, since state courts are not bound by federal precedent when it comes to matters of state law, they are free to interpret state statutory language more expansively. Some state statutes may go beyond what is required by federal law by using language requiring schools to "maximize the capabilities of handicapped children."[134] Massachusetts, for instance, requires reassignment of a child if the annual evaluation of his placement "shows that said program does not benefit the child to the maximum extent feasible."[135] But, the legal effect of this kind of language is unclear. Shortly before *Rowley*, the Supreme Court of Iowa ruled on such language. The Iowa special education statute requires that special education programs be "appropriate to the nature and severity of the child's handicapping condition." Parents of a handicapped child sought "the 'best' or 'maximum' program attainable" on the basis of the state statutory requirement that special education opportunities not only meet the needs, but "maximize the capabilities of children requiring special education." The Iowa Supreme Court flatly rejected the claim commenting that, "[t]he Iowa standard does not require the 'best' or 'maximum' program in the sense of an unlimited commitment of resources and effort to meet the needs of each handicapped child."[136]

Individualized Education Program (IEP)



Children who are covered under P.L. 94-142 and many state statutes must receive an IEP.[137] In some states, the general education law might provide additional, independent requirements for individualized attention.[138] The IEP is a central part of P.L. 94-142, and a first step after the so-called "child find" obligations of the state and local education agencies.[139] The IEP provides a relatively concrete basis for determining what is "appropriate" for a child.[140]

P.L. 94-142 outlines the analysis required in forming an IEP, and specifies procedures in great detail. The IEP is a written statement prescribing the child's education, developed in a meeting of parents, teachers, a qualified representative of the local education agency, and where appropriate, the child. Some state laws, like P.L. 94-142, require a "surrogate parent" to represent the interests of the child where true parents cannot be located or are otherwise unable to participate.[141] The IEP must include an assessment of the child's current levels of educational performance; annual goals and short-term objectives; the specific educational services to be provided, and the extent of the child's participation in regular educational programs; a planned starting and completion date for services; and appropriate and objective criteria (and scheduling) for evaluating the IEP on at least an annual basis.[142]

Most of the litigation concerning the meaning of an "appropriate" education has grown out of disputes over the content of the IEP. The pre-*Rowley* courts did not hesitate to order modifications in the content of a child's IEP, while acknowledging lack of educational expertise.[143] *Rowley* is likely to curtail judicial leeway in this area. Nonetheless, statutory standards require that certain factors be considered in IEPs. Mainstreaming is an example. A recurring flaw has been inadequate provision for contact with nonhandicapped children.[144] For example, as discussed below, courts have adopted as a measure of appropriateness whether a placement "mainstreams" the handicapped child with children who are not handicapped. An IEP would be acceptable if the preference for mainstreaming has been met, or considered and rejected for compelling reasons. Aside from mainstreaming, the Supreme Court's other criterion for approval of an IEP is whether the child can "achieve passing marks and advance from grade to grade."[145] The IEP requirement prohibits generalized rules as a basis for denial of services to individual children. Many courts have set aside IEP's which seemed to them insufficiently individualized to the particular child's unique needs.[146] Thus, categorical limitations on the length of the school year or on eligibility for residential placement are not permitted. Each of these are discussed below.

Related Services

"Related services" are required under P.L. 94-142, and under about half of the state special education statutes, but not under Section 504.[147] In theory only those children who are "handicapped" within P.L. 94-142's definition are eligible. The term in P.L. 94-142 refers to those supportive services that are necessary to help the handicapped child benefit from special education, such as transportation, psychological services, physical therapy, and medical services *only for diagnostic and evaluation purposes.*[148] Handicapped children have sought from schools a wide range of services, discussed below. Because of the high cost, some schools have questioned how much Congress intended to be included in the term, "related services."

Lower courts, however, have ruled that such service need not be specifically related to, or arise from the instructional function. They have treated as "related" those services without which the child would not be able to attend a regular classroom, thus including life support services. In the leading case of *Tatro v. Texas*, the U.S. Court of Appeals for the Fifth Circuit applied this analysis to require clean instrument catheterization (CIC) as a "related service" which the school would have to perform. Since the statutory definition of "related services" includes recreation and occupational therapy, the court explained, "[w]e fail to see how these services 'arise from the effort to educate' any more than CIC."[149] Moreover, if such a requirement were applied strictly, it would defeat the statute's purpose of "mainstreaming." Such an approach would lead to separate schooling for a physically disabled child who does not need special education, but who does need supplementary assistance in order to attend school with nonhandicapped children.

Some specific services have been identified as "related." First, schools must provide health-related services to handicapped children, as long as they are not medical services that can be performed only by a physician. Determination of the line between a health service (which a school is capable of providing) and a medical service (which only a doctor can provide) is likely to cause dispute. Further, the line may vary from state to state because of differences in state laws on what treatment must be provided or supervised by a physician.[150] Federal courts have consistently ordered schools to provide catheterization on the basis of P.L. 94-142.[151] One state court has refused to order catheterization, but the claim was asserted under the Michigan Handicappers' Civil Rights Act. The state appellate court noted that the state special education statute "may place affirmative duties to accommodate the handicapped,"[152] and therefore might require a different result.

Mental health services such as counseling, psychological services and psychotherapy are a second significant area of "related services" and source of dispute. The statute specifically requires only "psychological services," but the courts have consistently interpreted "related services" as including psychotherapy.[153] Connecticut schools, for example, have been ordered to pay for psychotherapy for institutionalized children who were schizophrenic or otherwise emotionally disturbed.[154] In a Montana case, the state court relied on the dictionary definition of "psychotherapy" to conclude that it was a psychological service under P.L. 94-142 and that Montana public schools must provide psychotherapy free of charge.[155] In this case, the federal law was held to override state law which specifically excluded psychotherapy.

Overall, the Supreme Court's analysis of the term "appropriate education" in *Rowley* is likely to constrict the expansive interpretation that lower federal courts have given to "related services' and to influence the already mixed decisions in this area by state courts. In general, courts may be less willing to order costly "related services" if an educational placement appears more or less adequate without the service.

Residential and Other Private School Placements

Residential placements are perhaps the most volatile and costly type of special services necessary under P.L. 94-142, and many state statutes. Section 504, however, does not require private school placements.[156] Although such placements often will be a necessary means of providing an "appropriate education" under P.L. 94-142, it is uncertain whether they should be treated as part of 'related services" or part of "special education."[157] The regulations adopted pursuant to P.L. 94-142 expressly require this expensive option in some cases:

> **If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.**
>
> *Comment.* **This requirement applies to placements which are made by public agencies *for educational purposes*, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.[158]**

Thus if a child's placement is made for educational reasons, it must be at no cost to his parents. Determining the motive for a placement decision is rarely easy. As a federal district court in the District of Columbia observed, the child's emotional, medical, social and educational needs are so closely interconnected "that realistically it is not possible for the court to perform the Solomon-like task of separating them."[159] Since the courts usually cannot ascertain which of the child's needs motivated the residential placement, they have required the placement on the basis of meeting the goals of the child's IEP. Federal courts have consistently rejected arguments by education officials that children's residential placements were necessitated by their emotional or social problems, rather than by education needs.[160] On the other hand, some state courts, applying state statutes, have refused to order residential placements, because they questioned the education need for the placement.[161]

Most states authorize placement of handicapped children in private schools, as shown in Table IV. Typically, such placements are restricted to schools that have received state approval.[162] Sometimes states require an evaluation of individual circumstances by the state commissioner of education. Usually placement in a private school is an option only if the public schools cannot adequately provide for the child.[163] Parents have frequently obtained reimbursement for a private school placement on the basis of these state statutes.[164] However, a number of state courts have required parents to bear the difficult burden of proving the inadequacy of the public school program before they can receive tuition reimbursement.[165] Private school placement and tuition reimbursement may be further limited by the preference of many state statutes, like P.L. 94-142, for placements in the "least restrictive environment." Some state statutes specifically make residential programs available only where a nonresidential placement is not feasible.[166]

There are a variety of other limitations on private placements. Many state statutes, such as Virginia's, limit private placements to "a nonsectarian private school." Nebraska limits reimbursement to "nonsectarian services." Well over half the state constitutions prohibit aid to religious schools. Some of these constitutional barriers have been interpreted liberally, thereby allowing payments to sectarian private schools under certain circumstances.[167] At least two state statutes expressly restrict private school placements to nonracially discriminatory private schools.[168] The fourteenth amendment imposes the same prohibition in the absence of such a statutory ban.[169]

The Least Restrictive Environment

Both federal statutes and about half of the state statutes give handicapped children a right to be educated in the least restrictive environment — to be "mainstreamed" with nonhandicapped peers in a normal academic setting whenever appropriate (*see* Table IV). The philosophy of "mainstreaming" emerged as a reaction to the practice of automatic removal and segregation of handicapped children away from the regular classroom. The concept's legal basis originated in the holding of *Brown v. Board of Education* that there is no such thing as "separate but equal education."

Yet, a potentially valid rationale exists for the segregation of children on the basis of handicap, as it does not for segregation on the basis of race. Where handicapped children's capabilities are limited by their handicaps, removal from the normal classroom to give special, individualized attention may be beneficial. Parents sometimes prefer more restrictive environments.[170] Several commentators have suggested that there is "a genuine conflict between parents who want the best quality education, no matter where it takes place, and advocacy groups committed to an anti-segregation philosophy."[171] Sometimes the health and safety of nonhandicapped children must be considered, as where the handicapped child has an infectious disease.[172]

The Supreme Court acknowledged in *Rowley* that the handicapped child's right to the least restrictive environment is not absolute.[173] The "mainstreaming" requirement may conflict with other statutory requirements for special education. The needs of a particular child will outweigh an abstract policy preference.[174] In order to take a child out of the regular classroom setting, a government agency must show that it is not "appropriate" to educate the child along with nonhandicapped children;[175] and, under Section 504, the agency must establish substantial *education* reasons why the child should not be "mainstreamed."[176]

Segregation is no longer the norm, however. Out of more than four million handicapped children in America, less than seven percent are estimated to be in separate schools or institutions.[177] One court ordered a public school, on the basis of P.L. 94-142, to provide air conditioning as a supplementary aid to the child's education, rather than segregating him in "a plexiglass cubicle."[178] The court reasoned that "[f]ull social interaction is an important part of educational curriculum and is even more vital to a child like Raul who necessarily suffers a certain degree of isolation as a result of his handicap."[179] Yet, an earlier court found no violation of equal protection when a child was segregated from the regular classroom in a special classroom because of the school's refusal to provide her catheterization services.[180]

Section 504 has also been interpreted, in regulations[181] and by the courts, to require the least restrictive setting possible. As one court put it, the legislative history to Section 504 reveals that "one abuse sought to be corrected was the erroneous denial of admission into regular classes."[182] A plan by the New York City Board of Education to exclude from regular classrooms all mentally retarded children who were carriers of hepatitis B was set aside on this basis. The court criticized the school board for totally failing to prove any justification for such an exclusion.[183] State courts have also recognized state law as a basis for giving priority to the least restrictive placement. Thus, one court ordered day schooling instead of institutionalization for a particular child.[184]

Costs

Financial considerations may affect what services schools must provide to handicapped children. Even though cost is not a defense to noncompliance, *Rowley* dictates that "appropriate" does not mean ideal. Parents of handicapped children do not have the right, in the words of one lower court, "to write a prescription for an ideal education for their child and to have the prescription filled at public expense."[185] That court also warned that nothing in state or federal law "can properly be read as mandating that costs may not be considered in determining what education is appropriate for a child — handicapped or not."[186]

Finally, P.L. 94-142 restricts a state's use of funds received under its terms: they can be used only to "supplement and in no case to supplant" state and local funds spent on special education.[187] This kind of limitation takes flexibility away from the states in meeting the costs of special education provided pursuant to P.L. 94-142. Similar restrictive language in Title I of the Elementary and Secondary Education Act of 1965[188] (providing funds for the educationally disadvantaged) has become the object of litigation.[189]

Cost factors are likely to become more and more important as funding for the handicapped must compete with general education funding.[190] *Rowley* seems to imply that costs may be considered, and a number of judicial opinions have in fact considered cost as a factor when fashioning a decree.[191] They have indicated that expenditures for nonhandicapped children may provide a measuring stick for expenditures for handicapped children,[192] but will not necessarily be the proper standard.[193] As the *Rowley* decision recognized, "to speak in terms of 'equal' services in one instance gives less than what is required by the Act and in another instance more."[194]

Thus, P.L. 94-142 still imposes substantial burdens on state and local education agencies after the *Rowley* decision. One of the most significant ways of dealing with these burdens is through cooperative efforts with other agencies involved in the care of handicapped children. Such cooperation is especially important since it is often difficult to distinguish handicapped children's educational needs from their medical or social needs, which are the responsibility of noneducational agencies. This cooperation is encouraged under P.L. 94-142 which recognizes the potential role of other public agencies, such as health and social services agencies.[195] Its regulations promote the use of interagency agreements.[196]

Interagency agreements can be a means of appropriately allocating the *fiscal* burdens of providing services for handicapped children, while retaining centralized *legal* responsibility for providing these services in the state education agency. Interagency collaboration in the delivery of services for the handicapped can result in "maximum utilization of shrinking appropriations and more efficient utilization of resources."[197] Accordingly, nearly two-thirds of the state special education statutes call for interagency cooperation in the delivery of special education.[198]

Affirmative Action

Section 504 also contains implicit practical limitations. For example, the U.S. Supreme Court has expressly ruled that Section 504 does not impose affirmative action obligations on recipients of federal funds. In the words of the *Davis* opinion, Section 504 "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[199] Despite *Davis*, some lower courts have continued to require special attention for the handicapped. For example, one court held that the mandate of equal opportunity "necessarily will require differing treatment for handicapped children because of their special and unique needs."[200]

More recently, a number of federal courts have reiterated *Davis*, and refused to order affirmative action. In *New Mexico Association for Retarded Citizens v. New Mexico*, the U.S. Court of Appeals for the Tenth Circuit reversed and remanded a lower court decision for failing to consider whether the financial burden on the state would be excessive. The lower court had found that New Mexico had discriminated against handicapped children under Section 504 by failing to provide them with a free appropriate public education.[201] Section 504 was the sole basis for the court's decision, since New Mexico had not participated in P.L. 94-142. The sweeping special education program ordered by the lower court has thus been set aside, at least tentatively.[202]

Other courts have applied *Davis* similarly to invalidate mass transit accessibility regulations based on Section 504.[203] Regulations issued by the U.S. Department of Transportation requiring major structural modifications were held to go beyond the scope of Section 504. Although schools have expressed concern about the feasibility of making facilities physically accessible to the handicapped,[204] Section 504 does not require public agencies to spend substantial money or incur *excessive* administrative burdens in removing barriers to the handicapped.[205]

However, refusal to take modest steps to accommodate handicapped persons could violate Section 504.[206] Even in *Davis*, the

Supreme Court acknowledged that a refusal to modify a program for a handicapped person may constitute discrimination, but found that the line between refusal and affirmative action would be difficult to draw. The Court was willing to leave it to administrative interpretation: "Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW."[207]

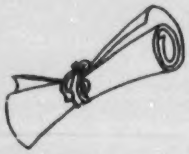
Length of the School Year

One of the major issues about the scope of the right to an "appropriate" education concerns the length of the school year. Since P.L. 94-142 emphasizes individualized education for each child, courts have consistently set aside rigid state rules that preclude determination of a child's individual needs. Specifically, several federal courts have held that states violate P.L. 94-142 when they limit special education programs to a specified number of days per year, such as 180 days. Pennsylvania and Georgia, for instance, both applied such restrictions because of budgetary limitations. The U.S. Court of Appeals for the Third Circuit and a federal district court in Georgia ruled that such inflexible rules were prohibited. The record in these cases indicated that, due to the interruption in their education, some severely handicapped children might regress to such an extent that they would require institutionalization. These courts ruled that regardless of cost, the state must provide year-round education for handicapped children, *when necessary.*[208]

Of course, handicapped students do not have an automatic right to summer school. P.L. 94-142 mandates *individualized* consideration of the particular student's needs. Indeed, some courts have accordingly refused to order schools to extend the school year for a handicapped child.[209] As one court explained, "[a]ll children regress academically during vacations. Yet no law requires all children be offered summer school."[210]

Some state special education statutes expressly provide for an extended school year when there is specific evidence that a summer interruption would result in severe regression for a handicapped child, thereby negating his or her ability to benefit from special education.[211] Oklahoma's statute, for example, provides for a maximum of 40 days of summer school services for those handicapped children whose "IEP states the need for a continuing education experience to prevent loss of educational achievement or basic life skills."[212] These statutes provide models for other states who wish to closely follow the developing judicial rule on extended school year for handicapped students.

Evaluation, Testing and Diplomas



The use of tests for ability grouping (or "tracking") of handicapped students is widespread, as is "competency" testing of students in general. More than three-quarters of the states now have competency laws, and in 17 of those, passage of the test is a requirement for a high school diploma.[213] Neither these statutes[214] nor most special education statutes specify whether handicapped students are subject to regular competency testing requirements. Much state policy in this area remains in the formative stages, with substantial discretion left at the local level. Even within a single state there are substantial differences among school districts in whether handicapped students receive a regular diploma or have to pass competency tests. At least five different policy approaches to graduation requirements for the handicapped are utilized:

- a uniform pass/fail approach for all students;
- a certificate of attendance approach;
- a standard diploma for completion of IEP approach;
- a special education diploma approach;
- a curricular approach specifying the varying curriculums for each diploma.[215]

Each approach has major policy advantages and drawbacks.

Although both "tracking" and competency testing raise more policy questions than legal issues, legal controversy has developed over many aspects of testing of handicapped children, such as whether they may be denied a high school diploma if unable to pass a basic competency test designed for the general student population. Serious problems also arise where a narrow basis, such as a single test, is used to permanently classify a child. Many of the same constitutional principles govern both ability grouping and student competency testing. By applying these principles, the text below identifies a series of general constitutional rules about testing of handicapped students, most of which are also specifically incorporated in the two federal statutes.

First, all students have an interest in attending school which cannot be abridged without receiving due process of law.[216] On the basis of this interest, courts have ruled that all children must be afforded *adequate notice* before being subjected to a competency test which is used as a diploma sanction.[217] This notice requirement has been held to be even more crucial for handicapped students.[218] Procedural requirements involved in testing and evaluation are further discussed in Chapter III.

Second, under federal equal protection analysis, the state would have to show only a rational basis for a policy of denying a regular diploma to handicapped students who are unable to pass a validated competency test. A rational basis would be easy to show, *e.g.*, preserving the integrity of academic standards. One federal appeals court recently held that a school board had "not implicated any constitutional right of plaintiffs by classifying them according to their reading level."[219] The court viewed the "classification scheme" of nonhandicapped students as "clearly rationally related" to the school's stated purpose of "provid[ing] students with the level of instruction most appropriate to their abilities and needs."[220] No claim of racial discrimination was made.

Handicapped students are legally entitled to equal access to education opportunity, but *not* necessarily to equal achievement. In the words of the Council for Exceptional Children, one of the oldest advocacy groups for handicapped children, "[e]ducational equality should be defined as equality of access to different resources to attain different individual goals."[221] No law mandates that all handicapped children will be capable of attaining the same results as nonhandicapped children. Neither P.L. 94-142 nor Section 504 prevents schools from denying handicapped students a regular diploma when they are unable to pass a valid and properly implemented test. Schools are not required to lower their academic standards to accommodate properly classified handicapped students who cannot meet those standards because of their handicap, and who are therefore not "otherwise qualified" within the meaning of Section 504.[222]

Third, the Constitution requires that competency tests, like other tests, be validated for the purpose used.[223] The U.S. Court of Appeals for the Fifth Circuit has ruled that a state must show that the competency test measures what was *actually* taught to all students. Earlier, another court directed that education officials must be able to show that IQ tests actually measure the characteristics allegedly being tested.[224] This general validation requirement has also been specifically incorporated in rigorous standards for fairness and validity in P.L. 94-142 and its regulations.[225] And because Section 504 forbids unjustified exclusion from regular education, it too requires that tests used for such purposes be validated.

A fourth constitutional principle is that the content of the tests may not carry a racial or cultural bias.[226] It will probably be unconstitutional to place students in special classes on the basis of tests not administered in their primary language.[227] P.L. 94-142,[228] and approximately one-fourth of all state laws,[229] specifically incorporate this principle for testing the handicapped (slightly more of the state statutes provide *general* fairness protections for the evaluation process). Because ability grouping from standardized tests often produces racially disparate results, assignments may produce segregated classes. Whenever such practices are questioned, the history of the school system must be considered. Tests may not carry forward the effects of past racial discrimination by producing a disproportionate failure rate among a racial minority where there has been a history of a dual school system.[230] If there are vestiges of past discrimination, the segregative ability grouping will be illegal.[231] Otherwise, ability grouping may be permissible "despite segregative effects." It is "not *per se* unconstitutional."[232] The use by California of intelligence (IQ) tests to classify "Educable Mentally Retarded" children has been held to violate the state and federal constitutions, as well as various federal and state statutes, in *Larry P. v. Riles.* The court held that education officials had the burden of showing that the content of the tests was not biased against any minority group.[233]

Even if a school's testing program satisfies constitutional requirements, it still must meet other significant testing obligations imposed by the two federal statutes. For instance, "tracking" of handicapped students inherently clashes with P.L. 94-142's mandate of "mainstreaming" handicapped students with nonhandicapped students whenever possible. Sometimes, of course, a special class segregated from the normal classroom may be a more effective way for a handicapped child to learn. And, although P.L. 94-142's mandate of a "free appropriate public education" does not necessarily include the "award of a diploma,"[234] those who complete their agreed-upon individualized education programs are entitled to *some* form of certification, probably more than a mere certificate of attendance or completion.[235] Thus, several state statutes provide for special diplomas, or special certificates for handicapped students.[236] By contrast, a unique provision in Illinois prohibits denial of a general diploma on the basis of failure on a minimum competency test when the failure is "directly related to the student's handicapping condition."[237] It is uncertain what this law means; but, in the words of one court, it "presumably does not mean that a person who knows nothing, due to total inability to learn, must receive a high school diploma."[238] Section 504 requires schools to make reasonable modifications in test administration to insure that a student's mastery of materials was fairly tested. For instance, "giving a blind person a test from a printed sheet discloses only his handicap and nothing of his knowledge. To discover a blind person's knowledge, a test must be given orally or in braille, if appropriate."[239]

Finally, language in P.L. 94-142 could be interpreted as forbidding the use of *one* test as a sole criterion for promotion or graduation of handicapped children. The provision expressly prohibits reliance on only one procedure "for determining an appropriate educational program for a child."[240] If a child's placement from one grade to the next were determined solely on the basis of performance on a competency test, that would violate this rule, and would be objected to by many educators on educational grounds.[241]

Sports

Both the due process and equal protection clauses of the Constitution require consideration of a child's individual abilities to participate in athletic programs. However, adjudication has been confined to statutory rules,[242] where it is even more clear that schools may not apply categorical rules excluding the participation of handicapped students in regular athletic programs. P.L. 94-142 mandates that handicapped children be allowed to participate in normal classes "to the maximum extent appropriate."[243] Schools must show *why* an individual child is not able to participate. Section 504 mandates that the "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[244] State civil rights laws provide a similar basis for challenging the exclusion of a handicapped child from sports programs.

The individual consideration required for a student under Section 504 will help handicapped high school and college students who wish to participate in contact sports, such as wrestling or football. A high school student wrestler was allowed to wrestle in *Poole v. South Plainfield Board of Education*, as the school had "nowhere suggested that Richard was incapable of pinning his adversary to the mat or meeting the training requirements of team sport."[245] To the contrary, the court observed that

> at the time in question, [he] was a vigorous, athletically inclined high school student in good health. His only physical problem was the absence of one kidney from birth. His single kidney was, however, a healthy one. Mr. Poole, the son of a former state champion wrestler, participated in the school wrestling program in his eighth, ninth and tenth grades.[246]

Poole obviously was "otherwise qualified," and adherence to rules based on unproven assumptions about the limitations of a handicap clearly violated Section 504.

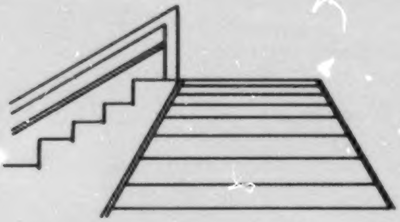
Another court, in *Doe v. Marshall*, held that a high school violated Section 504 by failing to allow an emotionally disturbed high school senior to play varsity football when he did not meet general eligibility requirements forbidding transferring senior high school students to play varsity football. The court regarded Section 504 as imposing on the school a "duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education."[247] The court's conclusion was notably dramatic:

> John Doe, because of his severe psychiatric difficulties, has a genuine, compelling need to participate in interscholastic football, and denying him this right, under the circumstances, would create irreparable harm. Participation in athletics during his senior year could mean the difference between John Doe's growing up as a normal, productive adult, as distinguished from the possibility of his being institutionalized for the rest of his life."[248]

The court construed Section 504 to require "special and individual handling" of the handicapped child's needs. The case is troubling, and has been weakened by the Supreme Court's subsequent ruling in *Davis.*[249] Following *Davis*, another court found that a mobility-impaired high school student was not "otherwise qualified" to participate in a school trip to Spain, requiring strenuous walking and climbing.[250]

Exclusion of the child is permissible if a "substantial justification" exists for the school's policy.[251] In *Kampmeier v. Nyquist*, school officials disqualified seventh and eighth graders with vision in only one eye from contact sports. They "relied on medical opinion that children with sight in only one eye are not qualified to play in contact sports because of the high risk of eye injury."[252] There was no contradictory medical evidence in the record. The federal court upheld the exclusionary rule. But, the age and maturity of the student can be an important factor; the court suggested a different outcome if the students were "old enough to weigh the risks and make the decision" by themselves.[253] Indeed, a subsequent court found it persuasive that the aspiring athlete was "an intelligent, motivated young man who is capable of making this decision which affects his health and well-being."[254]

Since the enactment of Section 504 and P.L. 94-142, school boards and athletic associations have begun to revise rules that had automatically excluded handicapped students, and some schools have waived upward age limits contained in general state eligibility rules for interscholastic athletics.[255] A very few state statutes specifically deal with the participation of handicapped students in sports programs. At least one state, New York, establishes a specific statutory procedure for determining the physical capacity of a student to participate in athletic programs. A *state* court applying that *state* law upheld the right of a high school student with vision in one eye to participate in high school athletics.[256] And, Illinois requires special or modified physical education programs for children "whose physical or emotional condition . . . prevents their participation in the courses provided for normal children."[257]



Access: Civil Rights Protection

Section 504, P.L. 94-142[258] and state laws prohibit the exclusion of handicapped students from education programs because of inaccessibility of the facilities. These laws require equal access to programs in their entirety, and do not require that every part of the building or every component of the program be made accessible.[259] Under Section 504 regulations, structural changes in existing facilities need *not* be made where there are other means of providing access, but "priority [must be given] to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate."[260]

Suppose a mobility-impaired child, unable to climb stairs, attends a two-story school where the geography classroom is on the second floor, accessible only by stairs. Because the child is not able to get upstairs, the school suggests conducting a special, separate geography class for that child alone downstairs. An alternative means of compliance would mean constructing a ramp, lift or elevator in order to make the regular classroom accessible to the child. Under the Section 504 regulation, the school would have to give priority to structural modification because it would provide "the most integrated setting appropriate."[261] P.L. 94-142's preference for mainstreaming would require a similar result. Of course, as discussed earlier, the more rigorous access requirements based on Section 504 have not fared well in the courts, and are undergoing regulatory revision.

Significantly, nearly every state has some sort of civil rights statute that prohibits discrimination in access to public accommodations. Public transportation is usually protected along with places of public accommodation. Most of the civil rights statutes provide a broad reach, such as to obtain "full and equal accommodations, advantages, facilities and privileges of any place of public accommodation."[262] Some, on the other hand, specify a much more limited scope, such as simply admittance to public places.[263] A "place of public accommodation" is typically defined as "[a]ny establishment or other place to which the general public is invited or which is intended for public use."[264] Some statutes do not define the term. Although few state civil rights statutes specifically include schools within the definition of "place of public accommodation,"[265] general definitions are sufficiently broad to include schools. To date, these state civil rights statutes have not been much utilized in litigation by handicapped students. Substantial questions about the scope of these statutes make most of them an uncertain source of education rights for handicapped students.[266]

Some states provide very limited protection, extending only to use of buildings by persons with physical handicaps, for example. A few states offer protection that applies only to blind or deaf persons with guide dogs.[267] Other states have comprehensive civil rights acts devoted exclusively to handicapped persons, such as Michigan's "Handicappers' Civil Rights Act." Even such a broad civil rights statute, however, does not necessarily require affirmative provision of special services.[268] Some states have comprehensive statutes prohibiting discrimination in education institutions,[269] and some contain broader prohibitions on discrimination in state-financed programs generally.[270] Of course, independent of civil rights laws, many states have other statutory requirements for construction of public buildings to insure physical accessibility.[271]

III. Procedural Rights

Constitutional Sources

The due process clause of the U.S. Constitution provides that no state shall "deprive any person of life, liberty or property without due process of law. . . ." State constitutions contain similar provisions. Two questions arise — *i.e.*, what is "life, liberty and property?" And what process is due? In *Goss v. Lopez*, the Supreme Court answered the first question for students in school: they have a liberty and property interest in public education. The Court answered the second question with a sliding scale. More elaborate procedures are required for severe denials of life, liberty or property. Capital punishment or life imprisonment would require extensive and careful procedures. A short-term suspension from school (up to 10 days) requires a very informal process, although the student "must be given *some* kind of notice and afforded *some* kind of hearing." The Court warned that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[272]

Earlier, both *PARC* and *Mills* required extensive specific procedures as safeguards for placing handicapped students.[273] Schools were obligated to give the parents of handicapped children prior written notice of proposed placement decisions, the right to examine all records concerning the child, the right to legal counsel and the right to a hearing before an impartial hearing officer prior to placement. Other federal cases decided around the time of *PARC* and *Mills* also found that handicapped children had a right to a hearing prior to placement in special classes.[274]

It is now less clear whether the *PARC* and *Mills* requirements are constitutionally mandated, because the Supreme Court has imposed important limitations on *Goss* in subsequent due process cases.[275] In 1978, for example, in *Board of Curators of University of Missouri v. Horowitz*,[276] the Court emphatically articulated a distinction between the kinds of due process required for academic and disciplinary dismissals from school. The Court held that the fact-finding proceedings required for disciplinary decisions were not constitutionally mandated for academic decisions, holding that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making."[277] Then, a year later in *Parham v. J.R.*, the Court held that full-scale adversary procedures were not required upon the admission of a child to a state mental hospital at the request of his or her parents.[278] Recognizing that a child has a liberty interest in not being mislabelled,[279] the Court expressed its confidence in the independent medical decision-making process[280] as a safeguard of the child's liberty interest. It is uncertain whether the placement decision would be treated as the sort of professional decision considered in *Horowitz* and *Parham*.

Nonetheless, lower courts have continued to find that the due process clause protects children from being classified as handicapped through an unfair evaluation process, such as use of a linguistically-biased test.[281] Similarly, handicapped students have a right to an impartial hearing before any form of constructive expulsion from school.[282] Children have a right to notice and opportunity for a hearing before being classified as handicapped, in order to avoid being mislabelled.

Due process could also require that parents be given specific notice at the outset of the implications of classification as handicapped.[283] At the time of the classification, the school should explain to the child and his or her parents that he or she will receive a "special education" in accordance with an IEP, rather than the standard academic program. As well, the difference between the goals of the IEP and the normal requirements for a high school diploma should be explained, so that parents will realize that the handicap classification may preclude exposure to the usual academic materials required for a regular diploma. If the parents disagree with such a proposed classification, a hearing to resolve the matter might be appropriate. Likewise, according to lower courts, handicapped students are constitutionally entitled to some sort of notice and hearing before any change in placement. And, handicapped children may not be excluded from the regular classroom without prior written notice and accompanying procedural safeguards.[284]

Federal and State Statutory Sources

Handicapped students enjoy extensive procedural protections under P.L. 94-142 and Section 504, as well as some state statutes. Most state laws provide for substantially fewer procedural safeguards than P.L. 94-142, however. A number of statutes, including

P.L. 94-142, are modeled on *PARC* and *Mills*. In enacting P.L. 94-142, Congress sought to insure fairness, to eliminate documented abuses (such as "dumping" of children into institutions), and outright denial of education to handicapped children. The procedural requirements apply to every aspect of the handicapped child's education — identification, evaluation, placement, and change in placement. Broadly, this law requires prior notice, fairness of procedure and opportunity for appeal.

Section 504 provides some additional basis for many of these safeguards. The regulations under Section 504 require "a system of procedural safeguards." Satisfaction of the procedural requirements of P.L. 94-142 will satisfy Section 504.[285]

By contrast, the state statutes as a group are much less specific than P.L. 94-142. Of course, states are free to establish procedural safeguards that are *more* stringent than P.L. 94-142 requires, and some, such as California and Illinois, for example, do provide as much or more detail on procedures.[286] Also, states may authorize procedures administratively, even though the detail is not specified by statute.[287] Only about half of these state statutes specify some sort of administrative appeal process for placement disputes. And even though only about a third of the statutes expressly provide that these decisions can be challenged in court, judicial review would probably be available under state administrative procedure acts.

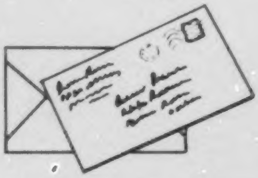
Informal Dispute Resolution

Before reviewing the formal procedures for resolving issues about the special education of a child, it seems wise to explore informal processes. Negotiation and mediation have proved to be effective methods of meeting the legal mandates for handicapped children.[288] Indeed, the sweeping reforms of both seminal cases of *PARC* and *Mills* were obtained through negotiation after the cases were filed, and then were presented to the court for approval. A number of states require negotiation or mediation by statute,[289] or by regulation.[290] State civil rights statutes frequently require or recommend attempts at conciliation prior to more formal enforcement measures. The Minnesota special education statute, for example, declares that "conciliation conferences . . . serve better than formal hearings to promote communications between parents and school staff and to reach prompt, shared decisions about educational programs for handicapped children."[291] The U.S. Department of Education also has recognized the effectiveness of mediation in resolving disputes about the education of a handicapped child:

> States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. . . . In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress.[292]

Even where mediation is not required, its usefulness should not be underestimated. Relatively few parents avail themselves of the formal hearing mechanism provided by laws such as P.L. 94-142.[293] Negotiation and mediation are available whether or not statutes or regulations require it, as long as parents and school officials are willing to give it a try, and as long as it is not used to delay or deny statutory rights. Such nonadversarial procedures are less costly in terms of money, time and energy. And, decisions are far more palatable to those affected by them if they have participated in the decision-making process. According to one survey of parents who received *formal* hearings, "half of them would not willingly go through such an experience again, even if they knew it would improve conditions for their children."[294]

Prior Notice



P.L. 94-142 requires that written notice must be given to parents whenever a school proposes to identify a child as handicapped or to change that identification.[295] Similarly, notice must be given before evaluation or placement of the child, or before any change in his individualized education program or placement.[296] Like P.L. 94-142, about half of the state statutes require giving parents notice and an opportunity to participate *before* a placement determination is made.[297]

P.L. 94-142[298] and a number of state statutes[299] expressly require that for the duration of any complaint, appeal or judicial proceedings, the child must remain in his current educational placement. There are a number of recognized exceptions to these so-called "stay-put" provisions. Parents and school officials can agree to interim changes in placement. In addition, some courts have ordered a change in placement, before final resolution of the case, to provide a child with an appropriate education[300] or to assure the child's physical health.[301] The state statutory "stay put" provisions usually allow for such health exceptions.[302]

What Constitutes a Change in Placement?

Although parents are entitled to prior notice of a change in placement under P.L. 94-142, "educational placement of the child" is not defined by the statute or regulations. Not every modification in a child's education is deemed a change in placement, according to the courts.[303] It is not a change in placement if a child is transferred from one site to another but remains in similar classes; or if a child is transferred from one regular school to another, along with all the students, upon closure of the first school;[304] or if a child is transferred from one private school, which is decertified, to another.[305] Education agencies thus retain discretion to make some adjustments in educational programs without going through full hearing procedures. On the other hand, a transfer from a special class in a *regular* school to a special class in a *special* school is a change in placement.[306] Where there is any question about a school official's good faith in deciding to close or decertify a school and make the transfer, due process may require a hearing.[307]

P.L. 94-142 also treats a *refusal* to change a placement as a trigger for notice and a hearing. As one court observed, "continuing a child in a particular program after his or her disability has changed poses precisely the same problems as do[es] moving a child from an appropriate program into an unknown one or changing a successful one."[308] If a child cannot contest a modification *before* it happens, he or she usually must live with the modification until all proceedings (judicial as well as administrative) are completed.

Evaluation Procedure

Under P.L. 94-142, parents are entitled to examine all records pertaining to the identification, evaluation or placement of the child.[309] They are also entitled to obtain an independent evaluation of the child.[310] P.L. 94-142 and many state statutes also require the appointment of a "surrogate" parent to protect the rights of a child whenever the parents are not able to do so.[311] While P.L. 94-142 does not specify who pays for the independent evaluation, regulations provide that it is at "public expense" under limited circumstances.[312] Only about one-fourth of the state statutes provide for an independent evaluation of the child, and not necessarily at public expense; some of these limit the circumstances in which such an evaluation can be obtained. Of course, there are other important protections involved in the evaluation procedure, which have been discussed as "substantive" rights above.

Administrative Review

P.L. 94-142 provides for administrative review of any complaints at an "impartial due process hearing."[313] This hearing may be conducted by either the local or state education agency, but if conducted by the local agency, there is a right to administrative appeal to the state agency. At the hearing, any party has the right to be accompanied by legal counsel or other experts, to present evidence and question witnesses, to get a verbatim transcript of the hearing, and to receive written findings of facts and decisions.[314] The statute requires an impartial hearing officer.[315] Employees of agencies involved in the education of a child are not considered impartial, and are prohibited from conducting these hearings. Courts have interpreted this rule strictly: the state should not be both "the guardian of the child and the reviewer of its own programs."[316] For instance, the Iowa Superintendent of Public Instruction, who was not even remotely involved in a particular child's education, was statutorily disqualified from serving as a hearing officer.[317] Likewise, a deputy commissioner of a state board of education could not conduct an impartial hearing.[318] P.L. 94-142's "impartiality" is much more demanding than general requirements under the Constitution.[319]

In a number of cases, the implementation of P.L. 94-142's review procedures conflicts with state law. For example, a state may make the findings of a state reviewing officer subject to a final discretionary review by a state board of education, but P.L. 94-142 forbids this.[320] P.L. 94-142 makes the hearing officer's decision final, subject only to the right to bring a civil action in court.[321] Such conflicts are usually resolved in favor of P.L. 94-142.[322]

State statutory standards for selection of hearing officers vary. For example, the Kansas statute explains at some length who cannot be an impartial hearing officer.[323] The Maine special education statute simply calls for "an impartial hearing officer," without specification of eligibility or disqualification.[324] Some statutes, such as Alabama's, make no reference to hearings or hearing officers. Other states, such as Alaska, use the state administrative procedure act, and delegate to the state department of education the responsibility for establishing regulations for the qualifications of hearing officers.[325]

State law, such as a state administrative procedure act or regulation, may also affect the scope of a hearing officer's authority.[326] Some state administrative officers have ruled that they have no authority to award damages.[327] Some state hearing officers have awarded compensatory services,[328] while others have denied them.[329] Generally, the federal courts have not addressed questions about the scope of authority of these administrative hearing officers. At least one court, however, has ruled that the hearing officer has authority only to determine whether a proposed placement is appropriate.[330] That court explained that if the placement is found inappropriate, the case must be referred back to the school for the development of a proper placement.

Discipline: Special Considerations

Although handicapped children are entitled to some extra safeguards in discipline, their discipline does not differ dramatically from discipline of nonhandicapped children. Upon a denial of education opportunity, the procedures mandated by *Goss* and other judicial decisions apply to handicapped and nonhandicapped alike. In nonemergency situations, the process of disciplining a handicapped child may be more protracted than for other children, but the specter of a misbehaving handicapped student who can *never* be removed from the classroom is not an accurate one: emergency removal from the classroom may be necessary to protect other children. Both the Supreme Court in *Goss*,[331] and other courts deciding handicap cases,[332] have expressly recognized the legitimacy of immediate removal of any child in emergencies. But, for any child, removal should be for no longer than the emergency would justify; a longer removal would require a hearing.

P.L. 94-142, state laws modeled closely on P.L. 94-142, and to some extent Section 504,[333] impose some special safeguards on the discipline of handicapped children. The school must determine not only whether the handicapped child actually misbehaved, but also whether the behavior was due to the handicap. For example, in *S-1 v. Turlington*, the U.S. Court of Appeals for the Fifth Circuit reviewed disciplinary actions against nine mentally retarded high school students charged with offenses ranging from masturbation to willful defiance of authority, obscenity and destruction of school property.[334] The Fifth Circuit insisted that although the *Goss* protections had been met, a hearing under P.L. 94-142 must be held *before* expulsion to determine if the misconduct resulted from each child's handicap.[335] The hearing follows the requirements for a change of placement hearing under P.L. 94-142. Where behavior is not handicap-related, normal disciplinary sanctions can be imposed, within certain parameters imposed by special education laws. That is, under P.L. 94-142 handicapped children can never be deprived of *all* education services, even during a period of expulsion.[336] Where the behavior is a manifestation of the disability, the hearing officer must first consider whether the student had been placed in an appropriate education program, and whether a change in placement is warranted.

Short term suspensions are another form of discipline commonly used with all shildren, and they are less likely to be viewed as changing the handicapped child's placement. Thus, in *Board of Education of Peoria, School District 150 v. Illinois State Board of Education*, a federal court held that suspension of a handicapped child for five days for swearing at a teacher was not equivalent to a change of placement. The Court reasoned that the absence was "possibly equivalent to that often caused by a common cold," and therefore not a change in placement.[337] In-school sanctions are another alternative available. The child's IEP may require forms of behavior management different from the school's usual disciplinary procedures used with nonhandicapped children.[338]

A number of alternatives to expulsion exist, with various legal implications. In some situations, school officials may appropriately bypass P.L. 94-142 hearings by resorting to some procedure beyond its reach — such as seeking a criminal prosecution. School officials must invoke such bypass procedures evenly among handicapped and nonhandicapped children, of course.

Although most state statutes do not specifically address the issue of discipline of handicapped students,[339] general statutory guidelines concerning the discipline of *all* students would apply.[340] For instance, the Iowa Supreme Court explained in *Southeast Warren Community School District v. Department of Public Instruction* that:

> We believe the policy expressed in the [state] special education chapter . . . puts a special gloss on any expulsion proceedings involving special education students. It does not preclude expulsion, but it requires special procedures before expulsion may occur. We hold these procedures must include re-evaluation of the child. . . .[341]

Some general statutes are simply codifications of basic constitutional principles, such as Minnesota's: "No public school shall deny due process or equal protection of the law to any public school pupil involved in a dismissal proceeding which may result in suspension, exclusion, or expulsion."[342] Several state statutes expressly require a continuation of education during any period of discipline (either for *any* expelled student[343] or just for handicapped students[344]). In some states, local school districts have the responsibility for developing procedures for disciplining the handicapped, which are compatible with general judicial guidelines.[345]

In the long run it may be better for mildly handicapped students to be placed in regular classrooms and be subject to short-term suspension. Otherwise, they might be placed in more restrictive environments out of fear they would be immune to normal discipline procedures.[346] Perhaps courts may consider the effects of a suspension on the child as a factor in determining the validity of a suspension. A suspension could be prohibited if the probable harm to the child's educational progress outweighed the need for discipline.

IV. Remedies

This section explores briefly the ways in which rights of handicapped students are enforced. Both administrative and judicial relief are available to remedy a violation of these rights. Aside from the remedies available to the individual, which are the focus of this chapter, most state statutes, like P.L. 94-142, contain various other provisions relevant to administrative enforcement, such as requirements for supervision and evaluation of special education programs, as well as reporting requirements.

Fund Withholding

Both Section 504 and P.L. 94-142 provide for termination of federal funds if a recipient of federal funds has violated their requirements.[347] About a third of the state special education statutes also contain express provisions authorizing the state to withhold funds to noncomplying local agencies.[348] Because withholding of funds is a drastic measure and because children in the programs feel the bite of the sanction,[349] in practice it is more a threat than a real sanction. Further, withheld funds are generally restored once compliance is achieved, so it may properly be considered a fund delay rather than a fund withholding. Finally, the federal government has rarely exercised its fund withholding powers under P.L. 94-142.[350]

Individual Lawsuits

Statutory Authorization

Unfortunately, not all disputes are resolved at the administrative level, and individuals often turn to the courts to decide the matter. A critical question with respect to individual enforcement of federal statutes, as well as state statutes, is whether the statutes were intended to establish a right to take an individual claim to court, or whether the rights are enforceable only through an administrative process. Not all federal statutes authorize individual recourse to the courts. P.L. 94-142 expressly gives the child a right to seek judicial relief.[351] Section 504, on the other hand, does not.

In 1981, in *Pennhurst State School and Hospital v. Halderman*,[352] the Supreme Court established new guidelines for determining whether a federal statute creates individual rights. It ruled specifically that one federal statute, the Developmentally Disabled Assistance and Bill of Rights Act does not give enforceable rights to individuals, but only establishes conditions for states participating in its funding program. More generally, however, the Court required that, for statutes based on the Congressional spending power[353] (rather than the authority to enforce the fourteenth amendment), any burdens on the states must be imposed unambiguously. The Court explained that Congress "understood the difference, financial and otherwise, between encouraging a specific type of treatment and mandating it, and merely meant to encourage it."[354] Thus, after *Pennhurst*, individual enforcement of any federal statute's provisions in the courts will be possible *only* where these criteria are met.

Pennhurst poses an initial hurdle to judicial enforcement of the claims of students based on either federal handicap statute. P.L. 94-142, however, differs significantly from the statute considered in *Pennhurst*, as well as from Section 504, because it expressly provides for a private right of action. In *Rowley*, the Supreme Court ruled that P.L. 94-142 *does* create enforceable individual rights to education, but followed the demands of *Pennhurst* to require unambiguous language, when interpreting the term "appropriate."[355] The Court found that Congress did not intend "to maximize each child's potential," as it did not make this explicit. Prior to *Rowley*, some lower courts were clearly troubled by the application of *Pennhurst* to P.L. 94-142. One district court applying *Pennhurst* to P.L. 94-142 found it was merely "a condition that each state must meet in order to qualify for Federal funds," and erroneously held it created no enforceable individual rights.[356] Others correctly disagreed and distinguished *Pennhurst*.[357]

Pennhurst may affect Section 504, which is silent on the question of private actions. The Supreme Court test for determining whether a federal statute gives a private right of action in court if the statute is silent on the point, requires (1) the plaintiff to be among those the statute intended specifically to benefit; (2) a finding that the legislature intended to create a judicial remedy; (3) the judicial remedy to be consistent with the legislative scheme; and (4) the matter to be one that is not traditionally a matter of state law.[358] On the basis of clear Congressional intent, Section 504 appears to meet this test and thus create an implied private right of action. An action by victims of handicap discrimination is consistent with the overall statutory scheme to prohibit discrimination. At least two federal appellate courts have ruled that private actions under Section 504 are permitted, even after *Pennhurst.*[359]

State courts have used this general approach of the U.S. Supreme Court to determine whether state statutes authorize private lawsuits.[360] Less than half of the state special education statutes specify that special education disputes are subject to judicial review. However, each state's administrative procedure act establishes standards for judicial review of agency action,[361] and may provide ample support for an individual lawsuit.

Requirement of Exhausting Administrative Procedures

Another critical issue concerns *when* judicial review should take place. Because courts are wary of usurping the role of the responsible agencies, they will not permit parties to come to court before exhausting administrative procedures. This requirement of exhaustion of administrative remedies does not preclude judicial review, but may delay it for a long time. Sometimes the ultimate administrative resolution of an issue leaves the parties relatively content and judicial review becomes unnecessary.

Courts need the expertise of agencies to guide them. In the words of the Supreme Court, "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[362] Courts have recognized that this general exhaustion principle is codified in P.L. 94-142.[363] It normally does not apply, however, where it would be futile to do so,[364] but even here, courts sometimes let the agency rule first. For example, where a prior ruling had seemed to establish an absolute policy, one court decided the commissioner of education might reverse himself.[365] At root, the courts are uncomfortable making judgments that might interfere with sensitive policy and are eager to defer to administrative agencies.

Exhaustion of administrative remedies is generally not required for claims brought under the equal protection clause[366] or Section 504.[367] The administrative procedure under Section 504 does not provide for *individual* relief, and Section 504's "ultimate remedy, a complete cut-off of federal funds to the institution [is] an inappropriate result for an individual complainant."[368] Therefore, individual claimants under Section 504 need not pursue administrative procedures because they contain no means of "specific vindication of personal rights."[369]

If a plaintiff asserts a denial of rights under several sources, such as the Constitution, P.L. 94-142 and Section 504, courts have a hard choice. Some have held that where the claims under both P.L. 94-142 and the Constitution or Section 504 are substantially the same, plaintiffs must exhaust the procedures under P.L. 94-142.[370] The courts have reasoned that a Section 504 claim is premature prior to exhaustion of the P.L. 94-142 procedures because the comprehensive policies of P.L. 94-142 otherwise could be easily circumvented. Finally, *complete* exclusion from education probably should be treated with greater judicial urgency because such total exclusion amounts to a willful violation of the child's rights. The willfullness of such a violation suggests that it would be futile to seek administrative redress.[371]

Standard of Review

Since most handicap claims come to court only *after* some form of administrative proceedings, a record of administrative findings will usually be available to the court. Another important enforcement issue concerns what weight the court should give these earlier findings. It is much easier to show that an earlier administrative decision was mistaken, than to show that it has *no* basis at all. The choice of the standard of judicial review can thus have a major impact on the outcome of a handicap case.

A federal court will treat a P.L. 94-142 claim as a *de novo* action, that is, it will rule independently: it will receive whatever new evidence is deemed relevant, in addition to the administrative record.[372] P.L. 94-142's strong policy of deference to agency expertise is thus tempered by its distrust for total reliance on such judgment. But, the Supreme Court's decision in *Rowley* has somewhat limited the scope of the federal courts' review: the courts' scrutiny is narrowed to whether a child's education is appropriate, as discussed in Chapter II.

On the other hand, state administrative procedure laws usually provide for a more limited review by state courts. As long as there is "substantial evidence" to support the agency decision, the state court is not free to "substitute its judgment on the evidence and may not set aside the board's decision unless it is not supported by competent and substantial evidence on the whole record."[373] Agency actions are usually presumed correct, as the Minnesota Supreme Court recently held.[374]

Some knotty questions may arise when a P.L. 94-142 claim is asserted in a state court.[375] Federal courts have ruled P.L. 94-142 claims must be judged under the federal standard of review.[376] If state administrative procedure conflicts with federal requirements, federal law controls.[377]

Injunctive Relief

Injunctive relief is the most common form of judicial remedy sought by handicapped students. It is also the most frequently awarded by the courts under both P.L. 94-142 and Section 504.[378] Typically, if a child's placement is challenged or the denial of certain services is contested, the courts will issue an order compelling a school to redesign the child's placement or provide a given service. Although the handicapped child is the most likely party to seek injunctive relief, a state agency might also seek it against a recalcitrant local agency.[379]

The so-called "stay put" provision with respect to placement has been regarded as "an automatic preliminary injunction."[380] As one court has described it, the "provision insures that a school cannot eject a child without complying with due process requirements."[381] Courts have also granted other preliminary relief under P.L. 94-142. Some courts have ordered a preliminary change in the child's placement, despite the "stay put" provision.[382] For instance, where the child's continued placement was deemed to pose an actual public health risk, a court refused to issue a preliminary injunction allowing the child to remain in his school placement.[383] A court also may order that the hearing schedule for a case be expedited in order to resolve a proposed change in placement.[384]

Some courts have also ordered compensatory educational services as a remedy.[385] For example, where a severely handicapped 18-year-old boy had been deprived of an appropriate education, the court ordered that he be provided with an appropriate education until his 23rd birthday,[386] although the statute did not require service to that age. Ultimately, compensatory services may be nearly as expensive as damage awards for schools.

Damages for Malpractice and Statutory Violations

Perhaps one of the most costly burdens placed on local governments occurs when a court awards damages to remedy a violation of a child's rights. Two different kinds of damages may be sought by handicapped students. The most frequently awarded are reimbursement for out-of-pocket expenditures. Sometimes children seek damages for harm caused when a school fails to appropriately identify, evaluate or place them, but such damages are rarely granted. Damages may be sought under common law (judge-made) rules or under statutes.

A potential common law basis for damages is often referred to as education malpractice. In the past decade, the courts have consistently rejected every claim of negligent failure to educate a child.[387] In *Hoffman v. Board of Education of the City of New York*, prior to the enactment of either Section 504 or P.L. 94-142, a child was evaluated as borderline retarded throughout his schooling, despite the school psychologist's recommendation that he should be retested. A jury verdict awarded damages for the school's negligence in failing to retest the child (who was subsequently found to be well within the normal intelligence range). However, the highest court of New York overturned the verdict and dismissed the case, saying:

> Clearly each and every time a student fails to progress academically, it can be argued that he or she would have done better and received a greater benefit if another educational approach or diagnostic tool had been utilized. . . . However, the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of this state.[388]

Another problem in malpractice claims is uncertainty about what standard of care must be exercised by an educator. As a legal matter, negligence occurs only when a recognized standard of care is violated.

By contrast to the common law, P.L. 94-142 and state statutes modeled on it specifically require the court system to review decisions to place handicapped children in varying education programs. Moreover, some commentators have warned that the IEP may supply the standard of care missing in malpractice cases, or that the IEP could be viewed as a contract that establishes a legally enforceable duty by the school.[389] Thus far, courts have rejected such suggestions: "Neither the statutory language [of P.L. 94-142] nor the context in which it appears demonstrates a Congressional intent to create any type of educational malpractice action."[390]

P.L. 94-142 authorizes "such relief as the court determines is appropriate."[391] Most courts have refused to award reimbursement costs of special education services under P.L. 94-142,[392] although some have done so.[393] Self-incurred costs are also unlikely to be recouped. For example, if a parent unilaterally changes a child's placement, reimbursement for private school tuition costs is highly unlikely.[394] Likewise, reimbursement for private placement may be denied if parents refuse to cooperate in permitting school authorities to examine or evaluate their child.[395] Nor can damages for harm to a child caused by improper placement be recovered under P.L. 94-142,[396] because such damages resemble a claim of education malpractice. However, under exceptional circumstances, parents have recovered money damages as reimbursement for the cost of services that should have been provided by the school when the services were necessary to protect the physical health of the child.[397] Parents have also obtained payment for damages when the defendant acted in bad faith, "in an egregious fashion" failing to comply with the procedural requirements of P.L. 94-142.[398]

The courts disagree about money damages under Section 504. Some have allowed this relief because Congress did not limit relief to equitable remedies (*e.g.*, an injunction),[399] reasoning that money damages are the only way of compensating for past discrimination; others disagree.[400] It is possible that courts will read *Pennhurst*, which generally requires explicit provisions in a statute's enforcement procedures, to disallow damages under Section 504.[401]

Another basis for damages might be found in Section 1983, an early federal statute, providing broadly for damages upon a violation of civil rights.[402] A number of states have statutes modeled on this law.[403] The Supreme Court in *Pennhurst* suggested[404] and subsequently confirmed[405] that Section 1983 is not available where the underlying statute (which created the right) contains an exclusive remedy for its violation. But the Court offered no guidance on how to determine if a statute's remedy was intended to be "exclusive." In analyzing whether an underlying statute was intended to provide an exclusive remedy, the Court held that "sufficiently comprehensive" remedies "may suffice to demonstrate Congressional intent to preclude the remedy of suits under Section 1983."[406] Following such reasoning, a number of lower courts have curtailed recourse to Section 1983 as a basis for damages by handicapped students.[407]

State Immunity From Assessment of Damages

Under common law rules, governments may interpose "sovereign immunity" to bar claims for damages. This rule has constitutional status: the eleventh amendment bars suits in federal courts against a state unless it consents (expressly or by implication) to the suit. It prohibits money claims that would be paid out of state funds.[408] Congress, acting under the fourteenth amendment's enforcement clause, also has power to waive state immunity from damages. State statutes also can expressly waive immunity and permit relief under certain circumstances.[409]

It could be argued that participation in P.L. 94-142 constitutes implied consent by a state to be sued for monetary damages, but federal courts have ruled that Section 504 and P.L. 94-142 do not constructively waive sovereign immunity.[410] Since the eleventh amendment does not prevent *prospective* relief against a state, the states could justifiably assume that only prospective remedies would be available.[411] Even if the eleventh amendment applies, it does not protect political subdivisions of the state, such as local school boards or municipal corporations.[412] Finally, the amendment may not prohibit state education agencies from awarding money damages.[413] The eleventh amendment likewise does not shield public officials from lawsuits brought against them in their individual capacities.[414]

However, political subdivisions and state officials retain some common law (judicially created) immunity. Applying this principle in *Wood v. Strickland*, the Supreme Court held that local school officials, sued in their individual capacity, are immune from damages for violation of a student's civil rights when they have acted in good faith "and within the bounds of reason under all the circumstances. . . ."[415] The test of good faith was whether board members knew or *should have known* that their actions violated a student's constitutional rights.[416] *Wood v. Strickland* figured heavily in one handicap case where a federal district court found that members of a school board had flagrantly violated the procedural rights of a handicapped child contrary to Section 504 and the Constitution. The court warned that the school board members may be personally liable for such abuses.[417]

With growing awareness of the rights of handicapped children, it becomes more and more difficult to plead ignorance of the law as a defense. In 1978, one court commented that "In July 1977 there *may* have been some justification for lack of information concerning the Trustees' legal obligations. There is no like justification now."[418] School officials have the burden of asserting "good faith" as an affirmative defense to claims against them.[419] Of course, intentional injury to a child is another matter, and provides a greater basis for personal liability for damages.[420]

Finally, school agencies may be held liable for the actions of their employees. The rule — known to lawyers as the doctrine of *respondeat superior* — generally applies to civil rights statutes.[421] But, the Supreme Court has held that it does not apply to actions under Section 1983.[422] At least one court has held that this doctrine applies to claims of discrimination under Section 504.[423]

Attorney's Fees

The availability of attorney fees can be a significant practical factor affecting whether aggrieved handicapped students are able to assert their education rights. Generally, however, attorney's fees can be awarded only where they are specifically authorized by statute.[424] (A party with a choice of several statutes would probably prefer to rely on those providing for attorney's fees.) P.L. 94-142 contains no specific authorization of attorney's fees. Arguably, they can be included as "appropriate relief" that courts are authorized to grant, but courts have rejected this contention.[425] By contrast, both Section 504 and Section 1983 contain a specific authorization of "reasonable" attorney's fees to the "prevailing party."[426]

It is uncertain whether attorney's fees can be obtained when handicap claims are asserted on the basis of other statutes *in addition to* P.L. 94-142. Court rulings have varied.[427] Overall, though, the courts are wary of added assertion of other statutes, such as Section 1983, simply "as a conduit to attorney's fees" in an action based on P.L. 94-142.[428]

Significantly, Section 1983 with its authorization of attorney's fees continues to be available as a remedy for violations of the Constitution.[429] The Supreme Court has limited Section 1983's availability where a federal statute provides "exclusive" remedies. Thus, if a handicapped student prevails on a claim of deprivation of *constitutional* rights, he may be entitled to an award of attorney's fees. But, as long as P.L. 94-142 exists, the constitutional claim would probably amount to a claim under P.L. 94-142 as well, and thus would have to be asserted through its administrative procedures. Section 1983 would be unavailable until after exhaustion of P.L. 94-142's administrative procedures.

In general, attorney's fees may be obtained even where a plaintiff has not technically "won" a final court decision. The courts have interpreted the term "prevailing" broadly: a party may be considered "prevailing" if he obtains only preliminary relief, and the case is dropped,[430] if the case has become moot, if a consent decree is entered, or if the case is otherwise settled.[431] In one case, plaintiffs, because they had obtained an additional hour of instruction each day, were "prevailing."[432] When the litigation has been terminated, the court has no further authority to consider attorney's fees.[433] Attorney's fees can be recovered for work done in administrative proceedings, as well as in judicial proceedings.[434]

If a claimant is entitled to an award of attorney's fees, there is often an issue as to amount. The rule is that the award must be "reasonable." What sum is reasonable has been an issue in a number of cases.[435] For instance, a court recently granted $8,424 in attorney's fees as a "reasonable" award for obtaining a residential placement for an autistic child after 140 hours of legal work. The court denied an additional "incentive fee" because it did not regard the case as "a complex or difficult matter to litigate."[436]

V. Summary and Conclusion

The extensive legal rights of handicapped students derive from several tiers of laws — federal and state constitutions, and federal and state statutes. As these rights developed in the last decade, there has been too little time to clarify the independent scope of each source of law. This booklet has discussed important common principles of many state statutes and P.L. 94-142, as well as Section 504. Perhaps the most basic principle to emerge from special education law is the right to individualized determinations based on actual abilities and needs. Virtually all special education law forbids making education decisions on the basis of stereotypes about handicapped children.

Themes

Shared themes in these laws include the right to a free appropriate public education, and the right to related services that include nonmedical health services, mental health services and private school placements, including residential placements. An "appropriate education" means one that is at least adequate to the individual child's needs, and from which he or she is able to derive some benefit. Another widespread theme is the handicapped child's right to be educated in the least restrictive environment — that is, to be "mainstreamed" in regular classrooms with nonhandicapped children whenever appropriate. This principle does not amount to an absolute right to be educated in the regular classroom. For example, the preference for the regular classroom will on occasion be outweighed by other factors, such as risk to the physical health of other children (but only when such risks are shown to be based on sound medical evidence).

The basic right of the handicapped child to receive an unbiased evaluation underlies many specific provisions intended to assure fairness, such as the right to an independent evaluation, provision for the appointment of surrogate parents when necessary, and "stay put" rules that forbid changing placement during disputes. The handicapped child also has the right to access to education programs that may not necessarily mean complete access to particular buildings. Requirements for the physical access to programs are for each *type* of program rather than every specific location. A handicapped child has the right to receive an extended school year *if* his or her individual needs require it; there is no automatic right to such an extended program merely because a child is handicapped. Likewise, the child is entitled to an individual determination of whether he or she is capable of participating in school sports programs. Tests used to evaluate handicapped children must be validated, and adequate notice about the testing must be given. Indeed, a key facet to any of these rights is that certain procedural safeguards must be provided. In sum, notice and an opportunity for a hearing must be given and scrupulous fairness insured in any administrative proceedings that follow.

There are a variety of different remedies available to enforce these rights. Although fund-withholding is a possible sanction under both federal statutes and some state statutes, it is rarely invoked. The handicapped child has frequently obtained injunctive relief under various statutes, but is usually denied monetary damages. However, the courts have uniformly refused to recognize a legal claim for education malpractice. Under certain exceptional circumstances, parents of handicapped children may receive reimbursement for services necessary to the child's physical health. Generally, however, administrative procedures must be exhausted before the courts will consider the matter. Although P.L. 94-142 does not authorize recovery of attorney's fees, they may be recovered for claims based on certain other statutes.

P.L. 94-142 and Federalism

P.L. 94-142 contains almost all of these general themes. Any discussion of special education law must recognize the impact P.L. 94-142 has had on state governments. The statute has substantially affected the way state education agencies operate.[437] P.L. 94-142 mandates centralized state responsibility for supervising all aspects of the education of the handicapped, even though it is delivered at the local level.[438] This responsibility may include review of financial arrangements concerning special education and coordinating the efforts of different agencies that provide services, such as health services and residential placements. Even the courts have recognized a "Congressional desire for a centralized point of accountability,"[439] to avoid "a finger pointing contest" over who has responsibility for educating handicapped children.[440] Funding is a major issue, as Congress has not appropriated sufficient funds to cover the costs of meeting the federal mandate.[441]

If P.L. 94-142 requires the states to substantially restructure their systems for providing special education, questions arise about state sovereignty under the federal Constitution. The tenth amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Many legal scholars thought the amendment had been fully retired following Roosevelt's threats to expand the size of the Supreme Court in the days of the New Deal. However, in 1976 in *National League of Cities v. Usery*, the Supreme Court again warned that the Constitution limits the power of Congress to disrupt "state policies regarding the manner in which they will structure delivery of . . . governmental services. . . ."[442]

Then, in *Pennhurst*, the Court held that mentally retarded residents of a state institution could not assert individual rights against the state on the basis of a federal grant program aiding the developmentally disabled.[443] A state should not become obligated by federal conditions attached to receipt of funds unless Congress had imposed the conditions "unambiguously."[444] The Court treated funding statutes based on the federal spending power as contracts between a state and the federal government and ruled that a state must "voluntarily and knowingly" accept the "contract," before it is obligated by its "terms."[445] The Court indicated that Congress must make express any intention to base legislation on the enforcement power of the fourteenth amendment.

Although abstract, these principles may affect federal special education laws. The text of Section 504 does not expressly indicate an intent to create state obligations enforceable by individuals. However, since *Pennhurst*, at least one lower court has noted that Section 504 arguably was based on the fourteenth amendment, and thus did impose enforceable legal duties on the states.[446] Because P.L. 94-142 expressly authorizes individual enforcement and clearly states the prescriptive conditions imposed on participating states, its terms do not appear vulnerable under *Pennhurst.* On the other hand, *Pennhurst* requires that those terms must be read strictly; "conditions" not articulated in the text of the statute may not be read into it by implication.

Multiple Sources of Rights

Alternative legal sources of education rights for handicapped children at the state level are especially important, since the future of federal statutes is uncertain. Even if the landmark federal legislation of the seventies were to be restricted or repealed, handicapped children would still possess substantial procedural and substantive rights under state and federal constitutions, and under state statutes. Current political and fiscal considerations may produce more of an emphasis on the state law.[447] Even now, the vast majority of expenditures for education of the handicapped are made with nonfederal funds.[448]

State special education statutes provide many of the same protections afforded by federal statute, but contain substantial ambiguities. The variation in scope among the statutes is significant. The different statutes apply to different populations as well. State statutes, like P.L. 94-142, provide some education services that are in the nature of affirmative action, while Section 504 does not mandate affirmative action programs. In addition, nearly every state provides at least limited civil rights protection that could potentially apply to education rights of handicapped students. But, the strength of these statutes is largely untested. A few state statutes, like Section 504, prohibit discrimination in education programs.

A number of the general themes discussed above are *not* spelled out in many state statutes. In particular, the state statutes as a group provide fewer procedural protections than P.L. 94-142. Since these themes usually are reflected in state administrative regulations or plans required by P.L. 94-142, the disparity among the state statutes has less significance now than it might in the future. If P.L. 94-142 did not require uniform assurances from the states concerning these basic themes, the dramatic variation among state statutes might have a much more significant impact on actual rights of handicapped students.

Finally, constitutional provisions at both the state and federal level may play an increasingly significant role in assuring handicapped children equal educational opportunities, because some state special education laws may themselves be weakened in the aftermath of federal cutbacks. The state education clauses, in particular, provide an important minimum guarantee of *some* public education to handicapped children. Although there is no federal constitutional right to education, the federal and state equal protection and due process clauses set outer parameters for fairness and equity in public treatment of the education of handicapped children.

Although the precise lines of these constitutional parameters have yet to emerge, some general rules are clear. As noted above, the Constitution prohibits treatment of handicapped children based on stereotyped assumptions. Likewise, handicapped children are entitled to notice and opportunity for hearing before any significant change in their education — from the initial classification as handicapped, to any disciplinary action affecting their placement. Likewise, the Constitution mandates fairness in any of these procedures and forbids determinations tainted by racial or cultural bias.

Footnotes

[1] 347 U.S. 483,493 (1954).

[2] *See, e.g.*, Beattie v. Board of Educ. of Antigo, 169 Wis. 231, 172 N.W. 153, 154 (1919), where the handicapped child was considered to have such a "depressing and nauseating effect upon the teachers and school children" that he should be excluded: "The right of a child of school age to attend public schools of this state cannot be insisted upon when its presence therein is harmful to the best interests of the school. This, like other individual rights, must be subordinated to the general welfare." The 1960's marked a transition era, in which children considered *educable* or *trainable* might be provided a free public education. *See, e.g.*, Esposito v. Barber, 74 N.J. Super. 289, 181 A.2d 201 (1962). Since many children did not meet these standards, they were thus not served: in 1975, it was estimated that nearly half of the handicapped children in the country were not being adequately educated. U.S. Dep't of Health, Education & Welfare Pub. No. (OE) 79-05003, Progress Toward A Free Appropriate Education 95 (1979) (hereinafter cited as U.S. Dep't of Health, Education and Welfare).

[3] In the *Brown* arguments before the Supreme Court, the attorney for South Carolina, John W. Davis, recognized the potential relevance of the fourteenth amendment to segregation of handicapped students:

> If [that argument] should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity. If it may classify it for one purpose on the basis of admitted facts, it may, according to my contention, classify for other.

Lippman & Goldberg, Right to Education, at 13 (1975). *See* American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1275 n. 5 (D.C. Cir. 1981).

[4] *See* Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

[5] 29 U.S.C. sec. 794 (Supp. 1981).

[6] 20 U.S.C. sec. 1400 *et seq* (1978 & Supp. 1981).

[7] *E.g.*, Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982) (construing term "appropriate" in state special education statute); Walker v. Cronin, 438 N.E.2d 582, 586-87 (Ill. App. 1982) (construing a placement "stay put" requirement in state special education statute); Harrell v. Wilson County Schools, 293 S.E.2d 687, 690 (N.C. Ct. App. 1982) (construing term "appropriate" in state special education statute). Likewise, the language of federal regulations interpreting federal statutes will often provide a model for state judicial interpretation of state statutes. *See, e.g.*, Littsey v. Board of Governors of Wayne State Univ., 108 Mich. App. 406, 310 N.W.2d 399, 405 (1981) (in construing the Michigan Handicappers' Civil Rights Act, the court stated that: "[a]lthough in no way binding upon this Court, we find instructive a regulation of the Department of Health and Human Services to be used in connection with sec. 504 of the Rehabilitation Act of 1973.").

[8] For example, virtually every state has adopted some civil rights law for the handicapped, although some of these do not apply to handicapped students. There are no federal requirements that the states adopt such laws. It should be noted, however, that in 1981 one state legislature failed to pass

a bill which would have amended the state civil rights laws to prohibit discrimination in public accommodations on the basis of *handicap*. Senate Bill No. 275 failed in the Tennessee legislature on March 24, 1981.

[9] *See* Education Daily, March 17, 1981, at 5-6; Education Week, March 17, 1982, at 10. *See also* the testimony of Joseph Fisher on behalf of the National Association of State Directors of Special Education (NASDE) before the Education and Labor Committee of the United States House of Representatives on April 6, 1981:

> In effect, there has been a "modeling" of state and local actions following the Federal role. I am concerned that as cuts in Federal funding and other federal decisions affecting reduced services to the handicapped are promulgated and implemented, the states and local districts will model these actions. This dominoing effect will have severe negative consequences on services to handicapped children across the nation.

A NASDE national survey on the impact of a repeal of P.L. 94-142 on state special education statutes indicated that if P.L. 94-142 were repealed, 13 states felt their statutes would be drastically reduced or eliminated soon afterwards, and at least 12 others felt minor changes would then be made at the state level. Almost all states predicted a great increase in litigation. *See generally*, National Rural Research and Personnel Preparation Project, A National Comparative Study Regarding Rural Special Education Delivery Systems Before and After Passage of P.L. 94-142 (1980).

[10] Wolf v. Legislature of Utah, Civ. No. 182646 (Salt Lake County Ct., Utah, Jan. 8, 1969). For a list of other early, and generally unpublished cases, *see* Comment, *The Handicapped Child Has A Right To An Appropriate Education*, 55 Neb. L. Rev. 637, 639-40 n. 5 (1976).

[11] 343 F. Supp. 279 (E.D. Pa. 1972) (PARC).

[12] 348 F. Supp. 866 (D.D.C. 1972).

[13] *Id.* at 875; 343 F. Supp. at 297.

[14] 348 F. Supp. at 874. The court relied on the District's compulsory attendance law and administrative regulations as "presuppos[ing] that an educational opportunity will be made available to the children."

[15] 343 F. Supp. at 283 n. 8.

[16] Several other commentators have arrived at the same conclusion. *E.g.*, Colley, *The Education for All Handicapped Children Act (EAH) A Statutory and Legal Analysis*, 10 J. of L. Educ. 137, 138, 143 (1981); Keim, *The Education For All Handicapped Children Act of 1975*, 10 U. of Mich. J. of L. Reform 110, 113 n. 20 (1976); Note, *Legal Remedies for the Misclassification of Wrongful Placement of Educationally Handicapped Children*, 14 Colum. J. of L. and Social Problems 389, 402 n. 69 (1979).

[17] The United States Supreme Court has never decided a case involving the constitutional rights of handicapped students in school. *Cf.* Schweiker v. Wilson, 101 S. Ct. 1074, 1081 n. 13 (1981) (expressly avoiding decision on the standard of review for cases involving classification on the basis of mental illness, in a social security case). *But see* Youngberg v. Romeo, 73 L. Ed.2d 28 (1982) (involuntarily committed retarded persons have a right to receive training).

[18] Handicapped Children's Education Project, Education Commission of the States, Special Education in The States: Legislative Progress Report (3rd report 1975).

[19] *See* Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977) *vacated and remanded sub nom.* Campbell v. Kruse, 434 U.S. 808 (1977) (instructing lower court to decide case on basis of Section 504, when the lower court had ruled on the basis of the Constitution). *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 411-412 & n. 8 (1978) (Stevens, J., concurring).

[20] 102 S. Ct. 3034, 3047 (1982). Congress had declared in P.L. 94-142 that its programs were necessary "in order to assure equal protection of the law." 20 U.S.C. sec. 1400(b)(9) (1981). However, the Court also observed that the equal protection clause "does not require states to expend equal financial resources on the education of each child." 102 S. Ct. at 3047, citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1975).

[21] Washington v. Davis, 426 U.S. 229 (1976).

[22] In Larry P. v. Riles, 495 F. Supp. 926, 974-86 (N.D. Cal. 1979), *appeal pending*, the requisite intent was shown through a combination of historical background, public controversy, and failure to examine the disparate impact of I.Q. testing on black children classified as educable mentally retarded.

[23] In Lora v. Board of Educ. of New York City, 623 F.2d 248, 250 (2d Cir. 1980), a lower court decision favoring emotionally handicapped children was sent back with instructions to determine whether the school had a policy of *deliberate* discrimination. *See also* Akers v. Bolton, 531 F. Supp. 300, 315 (D. Kan. 1981) where the court rejected the equal protection claims of epileptic students because no discriminatory purpose was shown, observing that, "[i]t would be an incredible anomaly if blacks and women had to establish that discriminatory effects reflected discriminatory purpose to prevail on an equal protection claim but epileptics did not."

[24] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 101 S.Ct. 715 (1981) (state ban on plastic, but not nonplastic, nonreturnable milk containers upheld as rationally based).

[25] 411 U.S. 1 (1973).

[26] However, this is true only of actions by *state* governments affecting aliens. Because of the federal government's preeminant role in matters concerning aliens, *federal* classifications on the basis of alien status are not subject to heightened review. *Compare* Nyquist v. Mauclet, 432 U.S. 1 (1977) (state case) *with* Mathews v. Diaz, 426 U.S. 67, 84-85 (1976) (federal case).

[27] Prior to the 1982 term, some courts have indicated that strict scrutiny might be required. *E.g.*, New York State Ass'n for Retarded Children v. Carey, 466 F. Supp. 487, 504 (E.D.N.Y. 1979), *aff'd*, 612 F.2d 644 (2d Cir. 1979) (specifically not deciding whether retarded children constituted a suspect class but calling such reasoning "appealing") (*held*, school board's plan to exclude from public school retarded children who were carriers of hepatitis B virus, while not excluding nonretarded carriers of the virus, violated several federal statutes, as well as the equal protection clause even under the relatively lenient rational basis test); Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975) (*Rodriguez* should be read narrowly, so as not to foreclose an equal protection claim to education by handicapped children).

See also Medley v. Ginsberg, 492 F. Supp. 1294, 1301-02 (S.D. Va. 1980) (denial of summary judgment); Panitch v. Wisconsin, 444 F. Supp. 320 (E.D. Va. 1977) (holding in favor of handicapped children on the basis of *Mills*, without discussion of the judicial test); Harrison v. Michigan, 350 F. Supp. 846, 848 (E.D. Mich. 1972) (dismissed as moot on the basis of a newly enacted state statute providing education for the handicapped); Casement v. Douglas County School Dist., No. 4935 (Douglas County Dist. Ct., Colo. Oct. 25, 1979) (*held*, school bus policy of providing transportation for nonhandicapped children, but not for handicapped children violated equal protection under the fourteenth amendment).

However, other courts have flatly ruled that the handicapped do not constitute a suspect class. Doe v. Colautti, 592 F.2d 704, 710-712 (3rd Cir. 1979) (classification according to mental illness may be justified by showing of mere rationality); Upshur v. Love, 474 F. Supp. 332, 337 (N.D. Cal. 1979);

Gurmankin v. Costanzo, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3rd Cir. 1977); Sherer v. Waier, 457 F. Supp. 1039, 1047-48 (W.D. Mo. 1977); Levine v. Institution & Agencies Dep't, 84 N.J. 234, 418 A.2d 229, 242-243 (1980) (mentally impaired children in institutions do not constitute a suspect class).

[28] In Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981), the court explained:

> First, unlike classifications based on race, there are no readily apparent divisions among the handicapped. Rather, mental and physical handicaps cover a continuum, from color-blindness or forgetfulness on the one hand to total spasticity or profound mental retardation on the other. In relation to other human beings, we are all handicapped to a certain degree, however, insignificant or debilitating that handicap may be.
>
> Most citizens would be handicapped in playing baseball as compared to Carl Yastrzemski, in singing as compared to Beverly Sills, in abstract thinking as compared to Albert Einstein, and in the development of a sense of humor as compared to Woody Allen. Human talent takes many forms, and within each talent is a continuum of achievement. While one individual might be on the high end of the scale of achievement in one area, that same individual might rank very low in another area. Woody Allen will probably never win the Triple Crown, and Carl Yastrzemski is not likely to perform "Aida." In sum, the identification of various gradations of handicap is not an easy task, especially if such is attempted in a vacuum. Assessing the capability of various individuals to perform without knowledge of the particular task under consideration and its various requirements, or without an individualized determination of their strengths and weaknesses would appear to be impossible.

Accord, Gurmankin v. Costanzo, 411 F. Supp. 982, 992 n. 8 (E.D. Pa. 1976), aff'd, 556 F.2d 184 (3rd Cir. 1977).

[29] Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).

[30] *Id.* at 3336.

[31] Plyler v. Doe, 102 S. Ct. 2382 (1982).

[32] Such stereotyped treatment has also been condemned by the Supreme Court as an "irrebuttable presumption" which unfairly precludes individual evaluation of a particular person's abilities. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (policy of furloughing pregnant teachers set aside, because each pregnant teacher is entitled to an individual determination of her abilities to teach). *Accord*, Gurmankin v. Constanzo, 411 F. Supp. 982, 990-92 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3rd Cir. 1977) (striking down a school rule preventing any blind person from taking a teacher's examination because it subjected the plaintiff to an irrebuttable presumption of physical incompetency — a denial of due process). *But see* Weinberger v. Salfi, 422 U.S. 749 (1975) (permitting irrebuttable presumption in Social Security law that spouse who was married to covered wage earner for less than nine months, married to obtain survivor's benefits).

[33] *See* Joyner v. Dumpson, 3 E.H.L.R. 553:580,584 (S.D.N.Y. 1982). For examples demonstrating the effect of the judicial test chosen on the outcome of the case, *see* Lines, *Tuition Discrimination: Valid and Invalid Uses of Tuition Differentials*, J. of C. and U. Law (forthcoming) at nn. 2-17, (Sept. 1982 draft).

[34] PARC v. Pennsylvania, 343 F. Supp. 279, 296 (E.D. Pa. 1972).

[35] 411 U.S. 1, 37 (1973). *See also* Kruelle v. New Castle County School Dist., 642 F.2d 687, 696 n.30 (3rd Cir. 1981); Frederick L. v. Thomas, 408 F. Supp. 832, 835 n. 4 (E.D. Pa. 1976); Casey, *The Supreme Court and the Suspect Class*, Exceptional Children, Oct. 1973, at 119, 123-24.

[36] *See* Turillo v. Tyson, 535 F. Supp. 577, 582 (D.R.I. 1982); Johnpoll v. Elias, 513 F. Supp. 430 (E.D.N.Y. 1980); Lombardi v. Nyquist, 63 A.D.2d 1058, 406 N.Y.S.2d 148 (App. Div. 1977); Ruth Anne M. v. Alvin Independent School Dist., 3 E.H.L.R. 553:565, 576-77 n. 14 (S.D. Tex. 1982) (denial of summary judgment).

[37] In re Levy, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556 (1976), *appeal dismissed sub nom.* Levy v. New York, 429 U.S. 805 (1976). *See also* Thiessen v. Sanders, Case No. A-44412 (1st Dist. Nev., Oct. 29, 1981) (order dismissing petition), *appeal pending* (*held*, state's statutory preference to blind and deaf children does not deny equal protection to mentally retarded children).

[38] Doe v. Laconia Supervisory Union No. 30, 396 F. Supp. 1291 (D.N.H. 1975).

[39] Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46, 56-57 (N.D. Ohio 1976). Ohio's statute at the time provided that children who were found "incapable of profiting substantially by further instruction" were not admitted to public school and instead were eligible for a training program. The court upheld this program as rationally based, because the state's system of "training" differed substantially from its compulsory education system. Training was viewed as a social welfare program, access to which could be limited constitutionally. *See also* Levine v. Institution and Agencies Dep't, 84 N.J. 234, 418 A.2d 229, 236-44 (1980).

[40] 20 U.S.C. sec. 1412(2)(C) (1978).

[41] Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). Generally, judicial discussion of tracking has focused on its racially discriminatory effects. *See, e.g.*, Castaneda v. Pickard, 648 F.2d 989, 994-98 (5th Cir. 1981); Diana v. State Board of Educ., C-70-37 RFP (N.D. Cal., June 18, 1973) (consent decree) (Mexican-American students improperly placed in classes for the handicapped on the basis of intelligence tests in English); Wright v. County School Bd. of Greensville County, Civ. Action No. 4263 (E.D. Va., June 16, 1981) (preliminary approval to stipulated agreement), reported in Lawyer's Comm. for Civil Rights Under Law, rep. no. 42, July, 1981, at 4-5. *See also* Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. Pa. L. Rev. 705 (1973). *But see* Martin Luther King Jr. Elementary School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324 (E.D. Mich. 1978).

[42] Parents in Action on Special Educ. v. Hannon, 3 E.H.L.R. 552: 108, 109 (N.D. Ill. 1980), *remanded for determination of mootness*, Nos. 80-2266, 80-2676 (7th Cir., Nov. 12, 1981).

[43] Larry P. v. Riles, 343 F. Supp. 1306, 1309 (N.D.Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974), *on remand*, 495 F. Supp. 926, 968-69 (N. D. Cal. 1979), *appeal pending*.

[44] *Id.* at 1314. The court was relying on Griggs v. Duke Power Co., 401 U.S.424 (1971) (race discrimination in employment).

[45] *Id.* at 1313.

[46] 73 L.Ed.2d 28, 39 (1982). Just last term, in a companion case involving the same institution, the Court warned that it had never found that persons committed to institutions have "a constitutional 'right to treatment.'" Pennhurst State School and Hospital v. Halderman, 101 S. Ct. 1531, 1539 (1981). The Court has agreed to review yet another appeal arising out of this case. Pennhurst State School and Hospital v. Halderman, 102 S. Ct. 2956 (1982).

[47] *E.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Gary W. v. Louisiana, 437 F. Supp. 1209, 1216-1220 (E.D. La. 1976); Association of Retarded Citizens of N.D. v. Olson, Civ. Action No. A-80-141, slip op. at 5 (D.N.D. Aug. 28, 1981) (denial of motion to dismiss) (acknowledging a federal constitutional right to treatment).

[48] However, in Joyner v. Dumpson, 3 E.H.L.R. 553:580, 584 (S.D.N.Y. 1982), the court set aside a state policy which required the state to take custody of a handicapped child before the child could be admitted to a residential treatment center. The court utilized a substantive due process analysis, in part, to conclude that the policy impeded a basic right to family integrity and served no important state interest.

[49] Miss. Const. art. 8, sec. 201 leaves it to the "discretion" of the legislature to provide for free public schools.

[50] Neb. Const. art. 8, sec. 1.

[51] *See, e.g.*, Ill. Ann. Stat. ch. 122, sec. 1-3 (Smith-Hurd 1962). "The terms 'common schools,' 'free schools' and 'public schools' are used interchangeably to apply to any school operated by authority of this Act." (The statement concerns a *statutory*, rather than constitutional provision).

[52] N.J. Const. art. 8, sec. 4.

[53] *See* Pauley v. Kelly, 255 S.E.2d 859, 869-78 (W. Va. 1979) for an extensive discussion of judicial analysis of "thorough and/or efficient clauses."

[54] Alabama, Georgia, Louisiana, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. *See* Table I, *infra*.

[55] N.H. Const. art. 83.

[56] *E.g.*, Alma School Dist. No. 30 v. DuPree, No. 77-406 (Ch. Ct., Ark., Oct. 26, 1981); Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Serrano v. Priest, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1976), *cert. denied*, 432 U.S. 907 (1977); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1976); Somerset County Bd. of Educ. v. Hornbeck, No. A-58438 (Cir. Ct., Baltimore, Md., May 19, 1981); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 550, 585 P.2d 71 (1978); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert denied*, 449 U.S. 824 (1980).

[57] Lujan v. Colorado State Bd. of Educ., No. 79 SA276 (Colo. Sup. Ct., May 24, 1982); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engleking, 96 Idaho 793, 537 P.2d 635 (1975); In re Levy, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556, *appeal dismissed sub nom.* Levy v. New York, 429 U.S. 805 (1976); Board of Educ. of Cincinnati v. Walter, 53 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Lisa H. v. State Board of Educ., 447 A.2d 669 673 (Pa. Commw. Ct. 1982). Of course, a denial of a particular kind of education is not necessarily sufficient to trigger strict scrutiny. *See, e.g.*, Lombardi v. Nyquist, 63 A.D.2d 1058, 406 N.Y.S.2d 148 (App. Div. 1977) (*held*, under rational basis test, no violation of equal protection where handicapped child was not allowed to attend the particular private school "particularly suited to his needs" because it had not been approved). *See* Note, *Developments, State Constitutions*, 95 Harv. L. Rev. 1324, 1444-63 (1982) for an excellent analysis of these cases.

[58] In re G.H., 218 N.W.2d 441 (N.D. 1974). *Accord*, State v. Stecher, 35 Conn. Supp. 501, 390 A.2d 408, 410-11 (Super. Ct. 1977).

[59] Scavella v. School Bd. of Dade County, 363 So.2d 1095 (Fla. 1978); Elliot v. Bd. of Educ. of Chicago, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978). *See also* Denver Ass'n of Retarded Children v. School Dist. No. 1, 188 Colo. 310,

535 P.2d 200, 204 (1975), where the Colorado Supreme Court implied that when a public school provides free kindergarten for nonhandicapped children, then handicapped students have a right to free kindergarten as well. *Cf.* In re Jessup, 85 Misc. 2d 575, 379 N.Y.S.2d 626 (Fam. Ct. 1975) (*dictum*, it would be unconstitutional to refuse to place child in private school if no adequate public school program were available).

[60] In re Levy, 38 N.Y.2d at 658-59. The court, however, also declared "[t]here can be no doubt that a handicapped child has a right to a free education in the State of New York." Under current New York law, parents are not required to pay for residential placement when it is necessary as part of a child's special education. *See* In re Gano, 105 Misc. 2d 740, 432 N.Y.S.2d 765 (Fam. Ct. 1980); Department of Social Services v. Ryder, 103 Misc. 2d 369, 425 N.Y.S.2d 944 (Fam. Ct. 1980).

[61] Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3336 (1982).

[62] Fla. Const. art. 1, sec. 2. ("No person shall be deprived of any right because of race, religion or physical handicap"); Mass. Const. amend. art. 114 ("No otherwise qualified handicapped individual shall solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth."). Note also a limited protection in Illinois: Ill. Const. art. 1, sec. 19 prohibits discrimination in employment or real estate practices on the basis of handicap.

[63] Scavella v. School Bd. of Dade County, 363 So.2d 1095, 1097-98 (Fla. 1978). *Cf.* Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882, 889 (1975) (*held*, state constitutional prohibition of discrimination based on sex made sex a suspect class).

[64] Plitt v. Madden, 413 A.2d 867, 870-71 (Del. 1980) (*held*, there was no denial of equal protection where a school provided a program for learning disabled students, although not necessarily individualized: "merely because an education program may be imperfect does not render it constitutionally invalid").

[65] *See, e.g.*, Department of Pub. Welfare v. Haas, 15 Ill.2d 204, 154 N.E.2d 265, 270 (1958) (*held*, parent must pay maintenance costs for child in state institution as the constitutional provision for free education did not extend to the feeble minded). *But see* Table I, Note 1, *infra*, for further comment on subsequent Illinois constitutional amendments.

[66] Levine v. Institution and Agencies Dep't, 84 N.J. 234, 418 A.2d 229 (1980). The New Jersey Supreme Court held that the "thorough and efficient" clause did not require completely free institutionalized care of profoundly retarded children: "[t]he constitutional mandate for a free public education simply does not apply to these unfortunate children." 418 A.2d at 237. The court warned that it was not deciding whether indigent parents could be required to pay institutional and related costs. 418 A.2d at 231.

[67] Hawaii Const. art. X, sec. 1; Mich. Const. art. VIII, sec. 2; Mont. Const. art. 10, sec. 7; Wash. Const. art. 9, sec. 1.

[68] Mont. Const. art. X, sec. 1; *accord*, Ill. Const. art. X, sec.1.

[69] Ark. Const. art. 19, sec. 19; Ariz. Const. art. 2, sec. 1; Colo. Const.art. 8, sec 1; Ga. Const. art. 7 (sec. 9, ch. 2-57) sec. 2-5702; Haw. Const. art. 9, sec. 2; Kan. Const. art. 7, sec. 1; Mich. Const. art. 8, sec. 8; Miss. Const. art. 8, sec. 209; N.M. Const. art. 12, sec. 11; Okla. Const. art. 13, sec. 2; W.Va. Const. art. 12, sec. 12.

[70] *E.g.*, Colo. Const. art. 8, sec. 1.

[71] *Compare* San Antonio School Dist. v. Rodriguez, 411 U.S.1 (1973) *with* cases cited in note 56, *supra*. Moreover, state courts are free to interpret their own constitutional provisions more liberally than the United States Supreme Court has interpreted the same provisions in the United States

Constitution. Minnesota v. Clover Leaf Creamery Co., 101 S. Ct. 715, 722-23 n.6 (1981); Pauley v. Kelley, 255 S.E. 2d 859,864 (W.Va. 1979). *See generally* Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A-1.

[72] Both the federal district court for New Mexico and the Tenth Circuit reserved ruling on the contention that New Mexico discriminated against the handicapped by electing not to participate in P.L. 94-142. New Mexico Ass'n for Retarded Children v. New Mexico, 495 F. Supp. 391,394 (D.N.M. 1980), *rev'd*, 678 F.2d 847, 853 n. 6 (10th Cir. 1982).

[73] Nevertheless, the New Mexico district court held:

> The State may not be technically required to monitor compliance with Section 504. Its failure to insure compliance by the local school districts, however, implicates it under Section 504 insofar as the State's status as the recipient of federal financial assistance obligates it not to permit, directly or indirectly, programs benefitting from federal financial assistance received by the State, to discriminate against handicapped persons. . .

495 F. Supp. at 397.

[74] *Id.* at 396; Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 105, 118-19 (D.Colo. 1981).

[75] 1974 U.S.Code Cong. & Ad. News 6373, 6390. Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d (1981); Title IX of the Education Amendments of 1972, 20 U.S.C. secs. 1681 *et. seq.* (1981).

[76] The statute originated in an unsuccessful attempt to amend Title VI of the Civil Rights Act of 1964 to include the handicapped. *See* Larry P. v. Riles, 495 F. Supp. 926, 962 (N.D. Cal. 1979), *appeal pending.*

[77] 442 U.S. 397 (1979).

[78] Thus, the Court rejected the lower court's view that the handicapped person need only be qualified "except for" his handicap. *Id.* at 406.

[79] *See, e.g.*, Joyner v. Dumpson, 3 E.H.L.R. 553:580, 583 (S.D.N.Y. 1982); Pinkerton v. Moye, 509 F. Supp. 107, 114 (W.D. Va. 1981); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1338-39 (W.D.N.Y. 1979); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977).

[80] Most recently the Court has ruled that proof of intent is required to show discrimination under an important older civil rights law known as Section 1981, 42 U.S.C. sec. 1983 (1981). General Building Contractors v. Pennsylvania, 102 S. Ct. 3141 (1982).

[81] Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1384 (10th Cir. 1981); New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391, 398 (D.N.M. 1980), *rev'a and remanded*, 678 F.2d 847, 854 (10th Cir. 1982). *See also* Jennings v. Alexander, 518 F. Supp. 877, 882-86 (M.D. Tenn. 1981) (*held*, some level of "a disparate impact test" is the proper standard for determining whether a reduction in medicaid coverage discriminated against handicapped medicaid recipients).

[82] A legislative measure, introduced in the House of Representatives on March 3, 1982, would require proof of *intentional* discrimination on the basis of race, sex, age, handicap and national origin. Education Daily, March 4, 1982, at 3.

[83] *Compare* Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D. N.J. 1980) *and* Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Pa. 1981) *with* Meyerson v. Arizona, 526 F. Supp. 129 (D. Ariz. 1981), *appeal pending.*

[84] Poole v. South Plainfield Bd. of Educ., 490 F. Supp. at 951.

[85] North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912, 1926-27 (1982).

[86] 20 U.S.C. sec. 1412(2)(C) (1978). *PARC* and *Mills* were influential and were used as a justification by Congress in developing P.L. 94-142. 1975 U.S. Code Cong. & Ad. News 1425, 1430.

[87] 20 U.S.C. sec. 1412(5)(B) (1978).

[88] 20 U.S.C. secs. 1412(5)(C), 1412(6), 1415 (1978). The procedural requirements are discussed in Chapter III.

[89] 20 U.S.C. sec. 1415(e)(2) (1978).

[90] The statutes range in length from two to 102 pages. *See, e.g.*, Ga. Code Ann. sec. 32-605a (1980); Cal. Educ. Code sec. 56000 *et seq.* (West Supp. 1982). Of course, there is not necessarily a correlation between length and clarity in a statute.

[91] *See* Akers v. Bolton, 531 F. Supp. 300, 315 n. 5 (D. Kan. 1981).

[92] 20 U.S.C. sec. 1401(1) (1978) (emphasis added).

[93] "Therefore, if a child does not need special education, there can be no 'related services' and the child (because not "handicapped") is not covered under the Act." 34 C.F.R. sec. 300.14 *Comment* (1981).

[94] *See, e.g.*, Tatro v. Texas, 625 F.2d 557, 562 (5th Cir. 1980). However, several state hearing officers have recognized this distinction and ruled that such a child was not handicapped within the meaning of P.L. 94-142. In re D.H., 3 E.H.L.R. 501:291 (Ga. 1979); Diane K. v. West Jefferson Hills School Dist., 3 E.H.L.R. 501:227 (Pa. 1979).

[95] This is the so-called "zero reject" philosophy. *See* Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 Val. L. Rev. 253, 255 (1978). Courts have noted that P.L. 94-142 does "not admit of the possibility that some children may be beyond the reach of educational expertise." Gladys J. v. Pearland Independent School Dist., 520 F. Supp. 869, 879 (S.D. Tex. 1981).

[96] 20 U.S.C. sec. 1413 (a)(4) (1978). The potential aid to parochial schools implicates the first amendment's establishment clause. For an overview of Supreme Court analysis of establishment clause issues, *see* Citron, *Consistent Inconsistency: Supreme Court Decisions on Public Aid to Private Education*, 1 Educ. Law Rep. 1069 (1982); Montgomery, *The Education for All Handicapped Children Act of 1975 and The Establishment Clause*, 8 J. of L. and Educ. 457 (1979). Some state special education statutes also may give assistance to parochial private schools. *See, e.g.*, Ariz. Rev. Stat. Ann. sec. 15-1181 *et. seq.* (1981 Special Pamphlet) (establishing a "Special Education Voucher Fund for Private Placement"); Miss. Code Ann. sec. 37-23-61 *et seq.* (Supp. 1981) (providing for tuition for exceptional children attending private or parochial schools). The courts have generally not addressed these issues. *But see* Warren v. Nusbaum, 64 Wis. 314, 219 N.W.2d 577 (1974) which analyzed and rejected an establishment clause challenge to the state special education statute's provisions for contractual arrangements with sectarian private schools.

[97] Green v. Johnson, 3 E.H.L.R. 552:449, 456 (D. Mass. 1981) (incarcerated status does not "eviscerate" entitlement to a free and appropriate special education under federal and state law.) *See also The Education of Willie Ferguson*, 10 Poverty Law Report 1 (May/June 1982) (settlement reached whereby 20-year-old deaf and dumb imprisoned child was sent to an out-of-state special school).

[98] 29 U.S.C. sec. 706(6) (1976).

[99] Diane K. v. West Jefferson Hills School Dist., 3 E.H.L.R. 501:227 (Pa. 1979) (*held*, child not entitled to private school placement under P.L. 94-142; child is entitled to access under Section 504). This limitation has also been recognized by some advocates of rights for the handicapped. Interview with Frederick J. Weintraub, Assistant Executive Director, Department of Governmental Relations, The Council for Exceptional Children, Washington D.C. (October 19, 1981).

[100] *Compare* Group Against Smokers Pollution v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1977) (*held*, persons who are harmed by

tobacco smoke are not "handicapped persons" within the meaning of N.C. Gen. Stat. sec. 168-1 *et. seq.* (1976) [civil rights statute protecting handicapped persons' rights to equal access to places of public accommodation]) *with* Vickers v. Veterans Administration, — F. Supp.— (D. Wash. 1982) (51 L.W. 2183, Sept. 28, 1982) (*held*, a man who gets sick from tobacco smoke is a "handicapped person" within the meaning of Section 504, but no discrimination was shown).

[101] 20 U.S.C. sec. 1412 (2)(B) (1978).

[102] Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 56 (N.D. Ala. 1981).

[103] Cal. Educ. Code sec. 56026(c) (West Supp. 1981); Iowa Code sec. 281.2 (1981); Mich. Comp. Laws. Ann. secs. 380.1711(1)(a) & (f), 380.1751(1) (Supp. 1981); Neb. Rev. Stat. sec. 43.601 (Supp. 1981); Or. Rev. Stat. sec. 343.035 (2) (1981).

[104] Iowa Code sec. 281.8 (1981); Mich. Comp. Laws Ann. secs. 380.1711(1)(a) & (f) and 380.175(1) (Supp. 1981); Neb. Rev. Stat. sec. 43.601 (Supp. 1981).

[105] *E.g.*, Colo. Rev. Stat. sec. 22-20-103(3.4) (Supp. 1981); Conn. Gen. Stat. Ann. sec. 10-76d(c) (West Supp. 1981); Ga. Code. Ann. sec. 32-605(a) (1980); Ill. Ann. Stat. ch. 122, sec. 10-22.38 (West Supp. 1981); La. Rev. Stat. Ann. sec. 17:1943(4) (West Supp. 1982); Mo. Ann. Stat. sec. 162.700(3) (Vernon 1981); Mont. Code Ann. sec. 20-7-412(2) (1981); N.J. Stat. Ann. sec. 18A:46-14.h(b) (West Supp. 1981); Wash. Rev. Code sec. 28A-13.050 (1981); W. Va. Code sec. 18-20-1 (Supp. 1981); Wis. Stat. sec. 115.85 (West Supp. 1981).

[106] *See* Swain v. Board of Educ., 116 N.H. 332, 360 A.2d 887 (1976), where the New Hampshire Supreme Court refused to order schooling for a 3-year-old child on the basis of its interpretation of the predecesor to N.H. Rev. Stat. Ann. sec. 186-C:1 *et seq.* (Supp. 1981). For a subsequent interpretation of that law, *see* Garrity v. Gallen, 522 F. Supp. 171, 185 n. 55 (D.N.H. 1981).

[107] Education Daily, July 14, 1980, at 5 (the Council for Exceptional Children (CEC) concluded that 18 states had narrowed their age policies since 1975). *But see* Education Daily, Sept. 9, 1980, at 3-4, and June 2, 1982, at 5.

[108] U.S. Dep't of Health, Education and Welfare, *supra* note 2, at 19.

[109] U.S. General Accounting Office, Disparities Still Exist in Who Gets Special Education 78 (1981) (Report to the Chairman, Subcommittee on Select Education and Labor, House of Representatives) (hereinafter cited as U.S. General Accounting Office).

[110] *See* Mack, An Analysis of State Definitions of Severely Emotionally Disturbed (Council for Exceptional Children, 1980) (unpublished report). The Massachusetts statute, for example, applies broadly to any "Children With Special Needs." Mass. Gen. Laws Ann. ch. 71B (West Supp. 1981). Some statutes include pregnant children within their definition of exceptional children, *e.g.*, Tex. Educ. Code Ann. tit. II, sec. 16.104(c)(1)(A) (Vernon Supp. 1981); Wis. Stat. Ann. sec. 115.76(3)(h) (West Supp. 1981).

[111] *E.g.*, Alabama, Arizona, Alaska, Colorado, Connecticut, Georgia, Kansas, Idaho, Louisiana, Mississippi, Missouri, North Carolina, North Dakota, Tennessee, and West Virginia. *See* Table IV, *infra*, for general citations to the statutes. It should be noted that some of these statutes contain separate sub-provisions for the gifted, which may be less comprehensive than the provisions for other exceptional children. One state court recently rejected a challenge to a state's inclusion (by administrative regulation) of gifted and talented students in the definition of exceptional children. Lisa H. v. State Bd. of Educ., 447 A.2d 669 (Pa. Commw. Ct. 1982).

[112] Central York School Dist. v. Commonwealth Dep't of Educ., 41 Pa. Commw. Ct. 383, 399 A.2d 167 (1979).

[113] U.S. General Accounting Office, *supra* note 109, at 69.

[114] Board of Educ. of Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034, 3043 (1982).

[115] 20 U.S.C. sec. 1401(18) (1978).

[116] 20 U.S.C. sec. 1401(19) (1978). In Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 53 (N.D. Ala. 1981), the court observed that "Congress did not attempt to create a detailed definition of an appropriate education for children operating under a vast range of handicaps. It chose instead to rely in the first instance on local educators acting in concert with the child's parents."

[117] Prior to *Rowley*, some lower courts intimated that an "optimum" education was appropriate. Age v. Bullitt County Pub. Schools, 3 E.H.L.R. 551:505, 506 (W.D. Ky. 1980) ("to furnish the optimum"), *aff'd*, 673 F.2d 141 (6th Cir. 1982); Kruelle v. Biggs, 489 F. Supp. 169, 173-74 (D. Del. 1980) (maximation of learning potential), *aff'd sub nom.* Kruelle v. New Castle County School Dist., 642 F.2d 687 (3rd Cir. 1981). Other courts have noted that not even *regular* education is perfect: "[t]he State is also not required to provide a perfect education to any child, and the Court is not called upon to determine whether plaintiff's education could have been better." Bales v. Clarke, 523 F. Supp. 1366, 1368 (E.D. Va. 1981). *Accord,* Battle v. Pennsylvania, 629 F.2d 269, 278 (3rd Cir. 1980), *cert. denied,* 101 S. Ct. 3123 (1981) ("even the best systems are incapable of achieving this goal.").

[118] Rowley v. Board of Educ. of Hudson Cent. School Dist., 483 F. Supp. 528 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd sub nom.* Board of Educ. of Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034, 3046 n. 21 (1982). The Court also vacated, in light of *Rowley*, an earlier ruling by the United States Court of Appeals for the Eighth Circuit even though its outcome appears to have been generally consistent with *Rowley.* Springdale School Dist. v. Grace, 656 F.2d 300, 304 (8th Cir. 1981), *vacated and remanded,* 102 S. Ct. 3504 (1982). The Eighth Circuit ruling had been one of the leading decisions interpreting "appropriate": that "it was not the State's duty to provide the *best* education. . . ." In *Springdale,* the appellate court had ruled that the deaf child would receive an "appropriate" education in the local public school, even though she could receive a "better" education at the State School for the Deaf. "Mainstreaming" of handicapped children with nonhandicapped children was a decisive factor.

[119] 102 S. Ct. 3050-3051.

[120] This is consistent with one of the leading pre-*Rowley* lower court decisions, Battle v. Pennsylvania, 629 F.2d 269, 278 (3rd Cir. 1980), *cert. denied,* 101 S. Ct. 3123 (1981), where the Third Circuit held that individual states should determine what constitutes an "appropriate" education, since the term did not encompass "specific substantive educational" content.

[121] 102 S. Ct. at 3047.

[122] *Id.* at 3054.

[123] *Id.* at 3047-48.

[124] *Id.* at 3047.

[125] *Id.* at 3044.

[126] *Id.* at 3051.

[127] Age v. Bullitt County Pub. Schools, 673 F.2d 141, 144 (6th Cir. 1982); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 55 n.12 (N. D. Ala. 1981). *See* Grkman v. Scanlon, 528 F. Supp. 1032, 1036 (W.D.Pa. 1982) where the issue before the court was whether placement in a private school for the deaf was "appropriate" under P.L. 94-142. In a decision distinctive for the court's personal biographical comments, the court disavowed the statutory criteria of P.L. 94-142 and instead used a concept derived from child custody law: "[t]he Court in analyzing the evidence must focus on the best interests of the child, rather than upon mechanical compliance with the terms of a somewhat general and inane document [the IEP]."

[128]

> The difficulty with the standard, of course, is that it depends on a number of different measurements which are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by nonhandicapped children.

Rowley v. Board of Educ. of Hudson Cent. School Dist., 483 F. Supp. at 534.

[129] 102 S. Ct. at 3051 ("courts must be careful to avoid imposing their view of preferable educational methods upon the states.").

[130] Kruelle v. New Castle County School Dist., 642 F.2d 687, 695 (3rd Cir. 1981).

[131] 34 C.F.R. sec. 104.33(a),(b) (1981) (emphasis added). However, the Supreme Court has warned that courts should give "diminished" deference to these regulations, since they were promulgated only after court order. Davis v. Southeastern Community College, 442 U.S. 397, 411-12 n. 11 (1979); *see also*, Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 115, 120-21 (D. Colo. 1981); Ruth Anne M. v. Alvin Independent School Dist., 3 E.H.L.R. 553:565, 576 n. 13 (S.D. Tex. 1982) (denial of summary judgment).

[132] New Mexico Ass'n for Retarded Children v. New Mexico, 495 F. Supp. 391, 396 (D.N.M. 1980), *rev'd and remanded*, 678 F.2d 847 (10th Cir. 1982); Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 115, 118 (D. Colo. 1981).

[133] Prior to the Supreme Court's decision in *Rowley*, the Supreme Court of Iowa relied on the lower court decisions in *Rowley*, and Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 101 S. Ct. 3123 (1981), and Springdale School Dist. v. Grace, 656 F.2d 300 (8th Cir. 1981), *vacated and remanded*, 102 S. Ct. 3504 (1982), to hold that the term "appropriate" under state law "requires a parity of educational opportunity between these groups. The district must strive to meet the needs of special education students with the same level of effort which is devoted to meeting the needs of nonhandicapped students." Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982).

[134] *E.g.*, Ark. Stat. Ann. sec. 80-2116 (1980); Iowa Code sec. 281.2(2)(1981); Mass. Gen. Laws. Ann. ch. 71B, sec. 2 (West Supp. 1981); Mich. Comp. Laws Ann. secs. 1701(a), 1711(a), 1751(1) (Supp. 1982); Mo. Ann. Stat. sec. 162.670 (Vernon Supp. 1982); Tenn. Code Ann. sec. 9-2912 (Cum. Supp. 1981); V.I. Code Ann. tit. 17, sec. 281 (1982). *See also* Fla. Stat. Ann. sec 393.13(2).3 (West Supp. 1981) (legislative declaration in "The Bill of Rights of Retarded Persons" that the education of mentally retarded persons is to "maximize their potential to lead independent and productive lives and which will afford opportunities for outward mobility from institutions."); Ga. Code Ann. sec. 32-603a (1980) (declaration in general education statute that it is "the policy of the State of Georgia to assure that each Georgian has access to quality instruction designed to develop his capacities to the maximum through programs that meet his developmental and educational needs.").

[135] Mass. Gen. Laws. Ann. ch. 71B, sec. 3 (Supp. 1981). *See* Isgur v. School Comm. of Newton, 400 N.E.2d 1292, 1298 (Mass. App. 1980) (analysis of the state reassignment provision in light of state statute's preference for "the least restrictive alternative placement").

[136] Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982); *see also* Harrell v. Wilson County Schools, 293 S.E.2d 687, 690-91 (N.C. Ct. App. 1982).

[137] 20 U.S.C. sec 1414(a)(5) (1978). *See, e.g.*, Cal. Educ. Code sec. 56001(e) (West Supp. 1982); Colo. Rev. Stat. sec. 22-20-108(4) (Supp. 1981); District of Columbia, Rules of the Board of Education sec. 450.4 (Supp. 1981); Ind. Code Ann. sec. 20-1-6-1(e) (Burns Supp. 1981); La. Rev. Stat. Ann. sec. 17:1945 (West Supp. 1981); N.H. Rev. Stat. Ann. sec 186-C:2(3) (Supp. 1981); N.C. Gen. Stat. sec. 115C-113 (Cum. Supp. 1981); N.D. Cent. Code sec. 15-59-02.1 (1981); Ohio Rev. Code Ann. sec. 3323.01(E) (Page Supp. 1981); Okla. State Ann. tit. 70, sec. 13-101 (West Supp. 1981); Tex. Educ. Code Ann. tit. 2, sec. 16.104(a)(8) (Vernon Supp. 1981); Va. Code sec. 22.1-214(B) (Supp. 1981); V.I. Code Ann. tit. 17, sec. 287(b) (1982). Current regulations under Section 504 impose an equivalent requirement. An IEP under P.L. 94-142 is one means of complying with Section 504. 34 C.F.R 104.33(b)(2) (1981).

[138] *See* Cal. Educ. Code sec. 33080 (West 1978) which provides "[e]ach child is a unique person, with unique needs and the purpose of the educational system of this state is to enable each child to develop all of his or her own potential." North Dakota is currently considering a proposal to give *all* children in the state an individualized education. *See* Mirga, "N. Dakota Considers Tailor-Made Instruction For All Pupils," Education Week, Feb. 24, 1982, at 6; Mirga, "N. Dakota Plan for Individualized Instruction Stirs Criticism," Education Week, April 21, 1982, at 4.

[139] 20 U.S.C. sec. 1412(2)(C) (1978). In a number of class actions, courts have ordered identification and development of IEP's for every handicapped child in the area. Jose P. v. Ambach, 3 E.H.L.R. 551:412 (E.D.N.Y. 1979) *aff'd* 669 F.2d 865 (2d Cir. 1982); Mattie T. v. Holladay, 3 E.H.L.R. 551:109 (N.D. Miss. 1978) (consent decree); P-1 v. Shedd, 3 E.H.L.R. 551:164 (D. Conn. 1979) (consent decree). *See also* Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3rd Cir. 1977) (identification ordered pursuant to state statute). Courts have underscored the importance of the IEP. Battle v. Pennsylvania, 629 F.2d 269, 272-73 (3rd Cir. 1980), *cert. denied*, 101 S. Ct. 3123 (1981) (the IEP is "the vehicle for giving content to the required 'free appropriate public education.'"); *see also* Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 52 (N.D. Ala. 1981).

[140] *See* Board of Educ. of Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034, 3049 (1982), where the Supreme Court concluded that when a child has been "mainstreamed" under an IEP, then "the system itself monitors the educational progress of the child."

[141] 20 U.S.C. sec 1415(b)(1)(B) (1978); *e.g.*, Cal. Educ. Code sec. 56050 (West 1982); Conn. Gen. Stat. Ann. sec. 10-94f *et seq* (West Supp. 1981); Kan. Stat. Ann. sec. 72-962(l) (1981); Ill. Ann. Stat. ch. 122, sec. 14-8.02 (Smith-Hurd Supp. 1981); La. Rev. Stat. Ann. sec. 17:1952(B)(2) (West Supp. 1982); Me. Rev. Stat. Ann. tit. 20, sec. 2131 (1-B) (Supp. 1981); Md. Educ. Code Ann. sec. 8-414 (1978 and Cum. Supp. 1981); N.H. Rev. Stat. Ann. sec. 186-C:14 (Supp. 1981); N.C. Gen. Stat. Ann. sec. 115C-116(c) (Cum. Supp. 1981); Ohio Rev. Code Ann. sec. 3323.05 (Page Supp. 1981); Or. Rev. Stat. sec. 343-155 (1) (1981); V.I. Code Ann. tit. 17, sec. 289(a)(2) (1982). *See generally* Ross, Policy Options relating to the Surrogate Parent Mandates of the Education for All Handicapped Children Act (Public Law 94-142) (CEC Policy Options Project 1980).

[142] 20 U.S.C. sec. 1401(19) (1978).

[143] Campbell v. Talladega County Bd. of Educ, 518 F. Supp. 47, 53, 55 (N.D. Ala. 1981); Laura M. v. Special School Dist. No. 1, 3 E.H.L.R. 552:152, 155 (D. Minn. 1980) ("The court feels ill-equipped").

[144] Campbell v. Talladega County Bd. of Educ., 518 F. Supp. at 55; Espino v. Besteiro, 520 F. Supp. 905 (S.D. Tex. 1981).

[145] Board of Educ. of Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034, 3049 (1982). Lower courts have judged whether an IEP was acceptable based

on whether the child was making progress toward the achievement of his educational goals. Gladys J. v. Pearland Independent School Dist., 520 F. Supp. 869, 877 (S.D. Tex. 1981); *see also* West Chester Area School Dist. v. Commonwealth, 43 Pa. Commw. Ct. 14, 401 A.2d 610, 612 (1979) (*held*, child should be placed in day school rather than residential facility, based in part on lack of improvement while in the residential facility).

[146] Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3rd Cir. 1981); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 51 (N.D. Ala. 1981); Laura M. v. Special School Dist. No. 1, 3 E.H.L.R. 552:152, 155 (D. Minn. 1980). *See generally* Battle v. Pennsylvania, 629 F.2d 269, 280 (3rd Cir. 1980) *cert. denied*, 101 S. Ct. 3123 (1981); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1277-79 (N.D.Ga. 1981), *appeal pending;* Riley v. Ambach, 508 F. Supp. 1222, 1246-47 (E.D.N.Y. 1980), *rev'd on other grounds*, 668 F.2d 635 (2d Cir. 1981).

[147] To require costly related services under Section 504 seems contrary to the Supreme Court's holding in *Davis* that Section 504 does *not* require affirmative action. 442 U.S. 397, 411 (1979). *See* Table IV for a tabulation of which state statutes provide for related services.

[148] P.L. 94-142 defines "related services" as:

> Transportation and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. sec. 1401(17) (1978).

[149] 625 F.2d 557, 664 n. 17 (5th Cir. 1980).

[150] Tatro v. Texas, 516 F. Supp. 968, 975 (N.D. Tex. 1981).

[151] *Id.;* Tokarcik v. Forest Hills School Dist., 3 E.H.L.R. 552:513 (3rd Cir. 1981), *cert. denied sub nom.* Scanlon v. Tokarcik, 102 S. Ct. 3508 (1982). *Contra*, Sherer v. Waier, 457 F. Supp. 1039, 1047-1048 (W.D. Mo. 1978) where the court found that the Constitution did not require a school to provide catheterization.

[152] Dady v. School Bd. of Rochester, 90 Mich. App. 381, 282 N.W.2d 328, 331 (1979); *but, see* Littsey v. Board of Governors of Wayne State Univ., 108 Mich. App. 406, 310 N.W.2d 399, 404 (1981). The court reversed a summary judgment in favor of a law school where a law student had claimed that policy disallowing tape recording of lectures constituted discrimination. It distinguished claims in *Dady* (to impose an *affirmative* duty) from the "*passive duty* not to interfere with 'the full utilization of or benefit from the institution' under [the state statute]. . . ." (emphasis added).

[153] Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981); Gary B. v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1980); Erdman v. Connecticut, 3 E.H.L.R. 552:218 (D. Conn. 1980), *appeal pending;* In re "A" Family, 602 P.2d 157 (Mont. 1979).

[154] Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981); Erdman v. Connecticut, 3 E.H.L.R., 552:218 (D. Conn. 1980), *appeal pending.*

[155] In re "A" Family, 602 P.2d 157 (Mont. 1979). An earlier decision had required parents to pay for psychiatric services. Doe v. Colburg, 171 Mont. 97, 555 P.2d 753 (1973). The court in *In re "A" Family* distinguished *Doe* on the grounds that federal law had not been taken into consideration. 602 P.2d at 166.

[156] Turillo v. Tyson, 535 F. Supp. 577, 588 (D.R.I. 1982) ("While Section 504 might require a school system to modify its schools to accommodate hand-

icapped children, it never compels a school system to finance a private educational placement.").

[157] *See* Kruelle v. New Castle County School Dist., 642 F.2d 687, 694 n. 23 (3rd Cir. 1981).

[158] 34 C.F.R. sec. 300.302 (1981).

[159] North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979).

[160] Kruelle v. New Castle County School Dist., 642 F.2d 687, 693-95 (3rd Cir. 1981); Gladys J. v. Pearland Independent School Dist., 520 F. Supp. 869, 875-76 n.8 (S.D. Tex. 1981); Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn. 1981); School Dist. No. 4 of Maricopa County v. Frazee, 3 E.H.L.R. 553:259 (D. Ariz. 1981); Erdman v. Connecticut, 3 E.H.L.R. 552:218 (D. Conn. 1980); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979); *see also*, Harris v. District of Columbia Bd. of Educ., 3 E.H.L.R. 552:498 (D.D.C. 1981).

[161] *E.g.*, Ingram v. Bethel Bd. of Educ., 34 Conn. Supp. 277, 387 A.2d 706 (Super. Ct. 1978).

[162] *See, e.g.*, Claudia K. v. School Dist. No. 118, 3 E.H.L.R. 553:651 (Ill. 1982), *rev'g* 3 E.H.L.R. 552:501 (Ill. County Ct. 1981) (*held*, under Illinois statute, local district had no authority to make placement in private institution which had not been approved by the state).

[163] *E.g.*, Welsch v. Pennsylvania Dep't of Educ., 42 Pa. Commw. Ct. 41, 400 A.2d 234 (1979) (*held*, placement in out-of-state private residential school denied where parents would not cooperate in letting the state determine if there was an appropriate in-state placement).

[164] Board of Educ. of Manchester v. Connecticut State Bd. of Educ., 179 Conn. 694, 427 A.2d 846 (1980) (*held*, public program inadequate and parents entitled to reimbursement under state statute for private tuition payments); Walker v. Cronin, 438 N.E.2d 582 (Ill. App. 1982) (*held*, parents entitled to reimbursement for private residential placement pursuant to state special education statute, as well as P.L. 94-142); Amherst-Pelham Regional School Comm. v. Department of Educ., 376 Mass. 480, 381 N.E.2d 922 (1978) (*held*, under state statutes, which provide for private placement without unnecessary delay, parents entitled to reimbursement from local school committee dating from time parents rejected school committee plan, following local hearing and prior to successful state appeal); Independent School Dist. No. 276 v. Minnesota Dep't of Educ., 256 N.W.2d 619 (Minn. 1977) (*held*, parents entitled to reimbursement for current year, pursuant to state law and state board rulings); New York City Bd. of Educ. v. Ambach, 452 N.Y.S.2d 731 (App. Div. 1982) (*held*, parent entitled to reimbursement for part of private school tuition costs, on the basis of state law); Krawitz v. Pennsylvania Dep't of Educ., 48 Pa. Commw. Ct. 155, 408 A.2d 1202 (1979) (*held*, parents entitled to reimbursement for private school following violation of due process requirements in failure to provide timely hearing and placement).

[165] In re Tobias, 87 Misc.2d 897, 336 N.Y.S.2d 775 (Fam. Ct. 1976); Isgur v. School Comm. of Newton, 400 N.E.2d 1292 (Mass. App. 1980).

[166] *E.g.*, S.C. Code sec. 59-33-80 (1976).

[167] For a compilation and general analysis of these constitutional provisions, *see* the forthcoming paper from the Education Commission of the States by Patricia Lines.

[168] *E.g.*, N.J. Stat. Ann. sec. 18A:46-19.2(b) (West Supp. 1981); S.C. Code sec. 59-33-50 (1976).

[169] Bishop v. Starkville Academy, 442 F. Supp. 1176 (N.D. Miss. 1977). The court also based this decision on P.L. 94-142.

[170] *E.g.*, Cox v. Brown, 498 F. Supp. 823, 829 (D.D.C. 1980) (*held*, preliminary injunction granted, ordering private residential placements re-

quested by parents; the court recognized the deviation from the "mainstreaming" requirement, but concluded that "each case must be considered on its own footing").

[171] Pittenger & Kuriloff, *Educating the handicapped: reforming a radical law*, The Public Interest, Winter 1982, 72, 81 (hereinafter cited as Pittenger & Kuriloff). *See* Grkman v. Scanlon, 528 F. Supp. 1032, 1037 (W.D.Pa. 1982) where the federal court appeared to disregard "mainstreaming" as a consideration in deciding a child's placement, on the belief that "[c]hampionship prowess will sooner be attained if she concentrates on intensive training and learning to swim before she plunges unprepared into the turbulent mainstream. When her strokes are stronger she will be able to make better headway in the water."

[172] *Compare* Ely v. Howard County Bd. of Educ., 3 E.H.L.R. 553: 288 (D. Md. 1982) (school's decision to exclude a severely retarded child who carried hepatitis B *was* found to be justified) *with* New York State Ass'n for Retarded Children v. Carey, 612 F.2d 622, 649 (2d. Cir. 1979) (no justification found for school plan to exclude *all* retarded children who were carriers of hepatitis B).

[173] 102 S. Ct. 3034, 3038 n. 4 (1982).

[174] Roncker v. Walters, 3 E.H.L.R. 553:121, 124 (S.D. Ohio 1981), *appeal pending*.

[175] P.L. 94-142 requires that:

> to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. sec. 1412(5)(B) (1978). *But see* sec. 1414(a)(1)(C) (iv) where the standard is only "the maximum extent practicable." This latent contradiction appears to have been thus far overlooked.

[176] "To deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance *without compelling educational justification* constitutes discrimination and a denial of the benefits of such program in violation of the statute." (emphasis added). Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W.Va. 1976). A handicapped child had been summarily excluded from regular classroom unless her mother was present; the court ruled that "[s]chool officials must make every effort to include such children within the regular classroom situation even at great expense to the school system."

[177] The President of the National Association of State Directors of Special Education, Peter Fanning, recently made this estimate. Education Daily, June 3, 1982, at 5.

[178] Espino v. Besteiro, 520 F. Supp. 905, 913 (S.D. Tex. 1981).

[179] *Id.* at 911.

[180] Sherer v. Waier, 457 F. Supp. 1039. 1047-48 (W.D.Mo. 1978) ("This court is not convinced that the Constitution places an affirmative duty on the defendants to provide special services for a special class of people as plaintiffs assert.")

[181] 34 C.F.R. sec. 104.34 (1981).

[182] Larry P. v. Riles, 495 F. Supp. 926, 967 (N.D. Cal. 1979), *appeal pending*.

[183] New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d. Cir. 1979).

[184] *E.g.*, West Chester Area School Dist. v. Commonwealth, 43 Pa. Commw. Ct. 14, 401 A.2d 610 (1979); Isgur v. School Comm. of Newton, 400 N.E.2d 1292, 1298 (Mass. App. 1980).

[185] Bales v. Clarke, 523 F. Supp. 1366, 1370-71 (D.Va. 1981).

[186] *Id.* at 1371.

[187] 20 U.S.C. secs. 1413(a)(9), 1414(a)(2)(B) (1982).

[188] 20 U.S.C. secs. 2736(c) (d) (Supp. 1981).

[189] *E.g.*, Nicholson v. Pittenger, 364 F. Supp. 669, 673-674 (E.D. Pa. 1973); Alexander v. Califano, 432 F. Supp. 1182, 1187 (N.D. Cal. 1977).

[190] Education Daily, May 19, 1981, at 3. Moreover, the Rand Corporation has recently estimated that schools spend more than twice as much to educate the average handicapped student as for the average nonhandicapped student. Education Daily, May 27, 1982, at 3-4. *See, also* Education Daily, June 23, 1982, at 2.

[191] Rettig v. Kent City School Dist., 3 E.H.L.R. 552:503, 507 (N.D. Ohio 1981); Pinkerton v. Moye, 509 F. Supp. 107, 113 (W.D.Va. 1981); Age v. Bullitt County Public Schools, 673 F.2d 141, 145 (6th Cir. 1982).

[192] Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).

[193] *E.g.*, Armstrong v. Kline, 476 F. Supp. 583, 605 (E.D.Pa. 1979), *remanded sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 101 S. Ct. 3123 (1981): "It is apparent that Congress recognized that 'equal' services does not always provide handicapped children with an 'appropriate education' and, thus by requiring defendants to meet the handicapped child's 'unique needs,' demanded that, in certain instances, more be provided." This language of "full equality of opportunity" is found at 20 U.S.C. sec. 1400(b)(3) (Supp. 1981).

[194] 102 S. Ct. 3034, 3047 (1982). *See also* Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982) ("[w]hether equality of education is actually realized depends on the nature of the handicap, availability of resources, and what effort is reasonable in the context of the individual case.").

[195] *See, e.g.*, 20 U.S.C. sec. 1412(6) (1978).

[196] 34 C.F.R. sec. 300.600 *Comment.* (1981).

[197] McLaughlin, Interagency Training Project 3 (1981) (on file at the Law and Education Center of the Education Commission of the States); *see* Education Daily, April 28, 1980, at 4.

[198] The following states' special education statutes contain provisions for interagency cooperation or agreements: Alabama, Alaska, Arizona, American Samoa, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Kansas, Georgia, Hawaii, Iowa, Indiana, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New York, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Virgin Islands, West Virginia, Washington and Texas. *See* Table IV for citations to the special education statutes.

[199] Davis v. Southeastern Community College, 442 U.S. 397, 413 (1979).

[200] Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 115, 122 (D. Colo 1981). *Accord*, Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1280 (N.D.Ga. 1981), *appeal pending*.

[201] 495 F. Supp. 391, 397 (D.N.M. 1980), *rev'd and remanded*, 678 F.2d 847 (10th Cir. 1982).

[202] 678 F.2d at 855 (the lower court failed to consider the costs and effectiveness of the program it had ordered). *See also* Turillo v. Tyson, 535 F. Supp. 577, 587 (D.R.I. 1982).

[203] American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); Dopico v. Goldschmidt, 518 F. Supp. 1161 (S.D.N.Y. 1981), *rev'd*, — F.2d — (2d Cir. 1982) (51 L.W. 2162, Sept. 21. 1982).

[204] *E.g.*, Education Daily, June 3, 1980, at 3-4. However, the President of the Association on Handicapped Student Services Programs in Postsecondary Education has predicted continued improvements in accessibility at the postsecondary level regardless of federal developments. Higher Education Daily, Dec. 1, 1981, at 2. *See also* Higher Education Daily, July 19, 1982, at 5.

[205] Garrity v. Gallen, 522 F. Supp. 171,209 (D.N.H. 1981).

[206] American Pub. Transit Ass'n v. Lewis, 655 F.2d at 1278; *see also* Dopico v. Goldschmidt, — F.2d — (2d Cir. 1982) (51 L.W. 2162, Sept. 21, 1982).

[207] Davis v. Southeastern Community College, 442 U.S. 397, 413 (1979).

[208] Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *remanded sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 101 S. Ct. 3123 (1981); Georgia Ass'n for Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), *appeal pending*. *See also* Stacey G. v. Pasadena Independent School Dist., — F. Supp.— (S.D. Tex. 1982) (*see* Education Daily, Sept. 2, 1982, at 4).

[209] Bales v. Clarke, 523 F. Supp. 1366 (D. Va. 1981); Rettig v. Kent City School Dist., 3 E.H.L.R. 552:503 (N.D. Ohio 1981); *accord*, In re Canton Public Schools, 3 E.H.L.R. 503:235 (Mass. 1982) in which a state hearing officer denied summer school for a 6-year-old handicapped child, concluding that the parents' showing that the child would benefit was not enough under Massachusetts' regulations requiring a *substantial* degree of regression in order to extend the school year.

[210] Bales v. Clarke, 523 F. Supp. 1466, 1370 (D. Va. 1981).

[211] *E.g.*, Minn. Stat. sec. 120.17 (5a) (Supp. 1981); N.H. Rev. Stat. Ann. sec. 186-C:15 (Supp. 1981); Okla. Stat. Ann. tit. 70, sec. 13-101 (West Supp. 1981); N.D. Cent. Code tit. 15, sec. 59-02.1 (1981); Wis. Stat. Ann. sec. 115.83(4) (West Supp. 1981); *see also*, Alaska Stat. sec. 14.30.350(2) (Supp. 1981); Cal. Educ. Code. sec. 56345(b)(4) (West Supp. 1982); Fla. Stat. Ann. sec. 236.013(2)(c)(4) (West Supp. 1981); Ill. Ann. Stat. ch. 122, 14-7.02 (Smith-Hurd Supp. 1981). *See generally* Education Daily, Aug. 20, 1982, at 5-6 (summarizing findings of a national questionnaire to the states about extended school year).

[212] Okla. Stat. Ann. tit. 70, sec. 13-101 (West Supp. 1981).

[213] Pipho, State Activity: Minimal Competency Testing (Education Commission of the States, Nov. 1981) (unpublished report).

[214] *But see* N.C. Gen. Stat. sec. 115C-178 (West 1981) which specifically permits the exclusion of handicapped students from testing programs; Cal. Educ. Code. sec. 51215 (d) (West Supp. 1981) which requires local districts to set differential standards of proficiency for handicapped students, and incorporate them into their individualized education programs.

[215] Ross and Weintraub, Equitable Competency Testing: Emerging Policy Issues and Options for Handicapped Students 10-15 & note 166 (CEC Policy Options Project 1980). *Cf.* Jennings v. Alexander, 518 F. Supp. 877, 883-86 (M.D. Tenn. 1981), which was not an education case, where the court distinguished section 504's requirement of "equal opportunity" and "meaningful access" from "similarity of results" which Section 504 does *not* require.

[216] Goss v. Lopez, 419 U.S. 565, 574 (1975).

[217] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), *rehearing denied*, 654 F.2d 1079 (5th Cir. 1981); Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981), *modified*, 540 F. Supp. 761 (S.D. Ga. 1982).

[218] Board of Educ. of Northport-East Northport v. Ambach, 107 Misc. 2d 830, 436 N.Y.S.2d 564, 574 (Sup. Ct. 1981), *appeal pending* (period of less than two years advance notice was inadequate). *But see* Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (C.D. Ill. 1982) where one year advance notice was considered adequate.

[219] Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981).

[220] *Id.*

[221] Ross and Weintraub, Equitable Competency Testing: Emerging Policy Issues and Options for Handicapped Students 5 (CEC Policy Options Project 1980).

[222] Anderson v. Banks, 520 F. Supp. 472, 511 (S.D.Ga. 1981), *modified*, 540 F. Supp. 761 (S.D. Ga. 1982); Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (C.D. Ill. 1982).

[223] This principle is derived from the due process and equal protection clauses of the federal Constitution. Debra P. v. Turlington, 644 F.2d at 403-407.

[224] Larry P. v. Riles, 495 F. Supp. 926, 970 (N.D. Cal. 1979), *appeal pending*.

[225] 20 U.S.C. sec. 1412 (5)(c) (1978); 34 C.F.R. sec. 300 532(a)(2) (1981).

[226] In *Debra P.*, the court found that the items had been adequately reviewed for possible racial or ethnic bias, and none was present. 474 F. Supp. 244, 261 (M.D.Fla. 1979), *aff'd* 644 F.2d 397, 406 (5th Cir. 1981), *rehearing denied*, 654 F.2d 1079 (5th Cir. 1981). *See* Larry P. v. Riles, 495 F. Supp. 926, 956-60 (N.D. Cal. 1979), *appeal pending*, for an extended analysis of such bias in intelligence testing for placement into special classes. *Cf.* Parents in Action on Special Educ. v. Hannon, 3 E.H.L.R. 552:108, 140 (N.D.Ill. 1980), *remanded for determination of mootness*, Nos. 80-2266, 80-2076 (7th Cir. Nov. 12, 1981) where the court disagreed with the *Larry P.* court that the intelligence test items revealed a racial bias.

[227] Diana v. State Bd. of Educ., Civil No. C 70 37 R.F.P. (N.D.Cal. Jan. 7, 1970) (stipulated settlement that all children would be tested in their primary language for placement in classes for the handicapped).

[228] P.L. 94-142 for example, requires that:

> testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate education program for a child.

20 U.S.C. sec. 1412(5)(c) (1978).

[229] *E.g.*, Cal. Educ. Code. secs. 560001(j), 56320 (West Supp. 1982); Kan. Stat. Ann. sec. 72-965(d) (1981); Ill. Ann. Stat. ch. 122, sec. 14-8.02 (Smith-Hurd Supp. 1981); La. Rev. Stat. Ann. sec. 17:1945 (West Supp. 1982); Mass. Gen Laws Ann. ch. 71B, secs. 2,3,7 (West Supp. 1981); Minn. Stat. sec. 120.17(3a)(d) (1980); N.C. Gen Stat. sec. 115C-113 (Supp. 1981).

[230] Debra P. v. Turlington, 644 F.2d 397, 408 (5th Cir. 1981), *rehearing denied*, 654 F.2d 1079 (5th Cir. 1981).

[231] Castaneda v. Pickard, 648 F.2d 989, 994-98 (5th Cir. 1981).

[232] *Id.* at 996. *See* Martin Luther King Jr. Elementary School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324 (E.D. Mich. 1978); *see generally* National Research Council, Placing Children in Special Education: A Strategy for Equity (1982) (discussed in Education Daily, July 29, 1982, at 1-2).

[233] 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd per curiam*, 502 F.2d 963 (9th Cir. 1974), *on remand*, 495 F. Supp. 926 (N.D. Cal. 1979), *appeal pending*.

[234] Board of Educ. of Northport-East Northport v. Ambach, 107 Misc. 2d 830, 437 N.Y.S.2d 564, 570 (Sup. Ct. 1981), *appeal pending;* Brookhart v. Illinois State Bd. of Educ., 534 F Supp. 725 (C.D. Ill. 1982).

[235] In Lenfant v. District of Columbia Bd. of Educ., 3 E.H.L.R. 552:272 (D.D.C. 1980), the court ordered the award of a "special education diploma" to a handicapped child who had completed her prescribed individualized course of study, but noted that she was not "entitled to an ordinary diploma."

[236] Fla. Stat. Ann. sec. 232.247 (West Supp. 1981); Or. Rev. Stat. Sec. 343.295 (1981).

[237] Ill. Rev. Stat. ch. 122, sec. 14-6.01 (Supp. 1981).

[238] Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725, 729 n. 5 (C.D. Ill. 1982).

[239] Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. at 728. A report by the National Research Council has noted that such test modifications have generally not been available until recently. Education Daily, May 19, 1982, at 1-2.

[240] 20 U.S.C. sec. 1412(5)(c) (1978).

[241] A National Research Council report on testing of the handicapped recently stated, "The use of one test score without additional information is strongly discouraged by nearly all professionals who work with tests." Education Daily, May 19, 1982, at 1-2. *Accord*, Education Daily, Aug. 31, 1982 (research findings show unreliability of use of test scores alone to place students in classes for the learning disabled or emotionally handicapped).

[242] Section 504 is the most frequent basis asserted for sports claims by handicapped students, sometimes along with an equal protection claim. Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Pa. 1981); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980); Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978), *vacated and remanded on other grounds*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2336 (1981); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977). Courts have not needed to address constitutional claims to access to sports programs, because of the strong statutory protections, *e.g.*, Poole v. South Plainfield Bd. of Educ., 490 F. Supp. at 954.

[243] 20 U.S.C. sec. 1412(5) (1978). Instruction in physical education is included in the statutory definition of "special education", and "recreation' is included in the definition of related services. 20 U.S.C. secs. 1401(16),(17) (1978).

[244] Davis v. Southeastern Community College, 442 U.S. 397,405 (1979).

[245] Poole v. South Plainfield Bd. of Educ., 490 F. Supp. at 953.

[246] *Id.* at 951.

[247] Doe v. Marshall, 459 F. Supp. 1190, 1191 (S.D. Tex. 1978), *vacated and remanded*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2336 (1981). The interschool athletic league had enforced its rule concering the eligibility of transfer students. The rule did not mention handicapped students. Such rules have been upheld against constitutional challenge based on alleged infringement of the right to travel. In re Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982).

[248] *Id.*

[249] By the time the athletic league's appeal was decided, John Doe had graduated. The Fifth Circuit vacated the lower court's decision as moot, but nevertheless directed the lower court to grant an award of attorney's fees. 622 F.2d 118 (5th Cir. 1980). Ultimately, the league was ordered to pay $12,000 in attorney's fees to John Doe. *See* Education Daily, May 20, 1981, at 3. The Supreme Court fell one vote short of accepting the case for review, 101 S. Ct. 2336 (1981). For a general discussion of *Davis*, *see* the text *supra*, headed "Affirmative Action."

[250] Wolff v. South Colonie Cent. School Dist., 3 E.H.L.R. 553:592,594 (N.D.N.Y.1982); *accord*, Zorick v. Tynes, 372 So.2d 133,140 (Fla. Ct. App. 1979) (*dictum*, "Section 504 does not forbid recipient school districts to exclude partially blind students from contact sports." But, some relief may be available under a state civil rights statute).

[251] Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977).

[252] *Id.* at 299.

[253] *Id.* at 300 n. 9.

[254] Wright v. Columbia Univ., 520 F. Supp. 789, 794 (E.D.Pa. 1981). *Accord*, Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948,953-54 (D.N.J. 1980) ("Life has risks. The purpose of Section 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.").

[255] The American Alliance for Health, Physical Education, Recreation and Dance has observed such progress since the passage of the two federal statutes. Education Daily, June 6, 1980, at 3. *See* Relic, "Policies Governing Interscholastic Athletics Face Challenges From Athletes Seeking Equal Access," Education Week, Dec. 14, 1981, at 24; Letters to the Editor, "Handicapped Athletes and Eligibility: Exceptions to the Rules are Unwise," Education Week, Feb. 10, 1982, at 19; Letters to the Editor, "Eligibility and Handicapped Athletes: A Moral Challenge," Education Week, Jan. 19, 1982, at 18.

[256] Swiderski v. Board of Educ. of Albany, 95 Misc. 2d 931, 408 N.Y.S.2d 744 (Sup. Ct. 1978), applying N.Y. Educ. Law sec. 4409 (McKinney 1981).

[257] Ill. Ann. Stat. ch. 122, sec. 27-6 (Smith-Hurd Supp. 1981).

[258] 20 U.S.C. secs. 1412(5), 1414(a)(1)(C)(iv) (1978). The requirement of facilities accessibility is implicit in P.L. 94-142 from its mandate to educate handicapped children with nonhandicapped children, to the "maximum extent appropriate". However, in another section, the mandate is merely to the "maximum extent practicable." The two standards seem to have opposite implications: one focuses on the needs of the child, while the other suggests cost and feasibility. In addition, "related services is defined to include transportation not only to and from school, but also "[t]ravel in and around school buildings," as well as "[s]pecialized equipment" including lifts and ramps. 34 C.F.R. sec.300.13(b)(13) (1981). And, the "least restrictive environment" requirement also calls for the use of "supplementary aids and services" in order to permit attendance in the regular classroom. 34 C.F.R. sec. 300.550(b)(2) (1981).

[259] *See* Garrity v. Gallen, 522 F. Supp. 171, 215-18 (D.N.H. 1981).

[260] 34 C.F.R. sec. 104.22(b) (1981). This is the section which specifies methods of compliance with Section 504's accessibility requirements.

[261] The Office of Civil Rights issued a clarification of the Section 504 access standard which reiterates the priority of mainstreaming while stressing the leeway afforded in determining how to achieve it: the "Section 504 regulation was carefully written to require 'program accessibility' not 'building accessibility' thus allowing recipients flexibility in selecting the means of compliance." *Policy Interpretation* No. 3; Comment, *Education: Interpretation of Section 504 of the Rehabilitation Act of 1978*, 19 Washburn L.J. 625, 629 n. 38 (1980).

[262] *E.g.*, Ala. Code sec. 21-7-3 (1975); Alaska Stat. sec. 18.06.020 (1962); Cal. Civil Code sec. 54.1 (West 1982); Colo. Rev. Stat. sec. 24-34-801 (Supp. 1981); Del. Code Ann. tit. 16, sec. 9502(b) (1975); D.C. Code Ann. secs. 6-1701, 6-1702 (Michie 1981); Fla. Stat Ann. sec. 413.08(1) (West Supp. 1981); Ga. Code Ann. sec. 79-601 (Cum. Supp. 1981); Hawaii Rev. Stat. sec. 347-13 (1976); Idaho Code secs. 56-702, 56-703 (1976); Ill. Ann. Stat. ch. 23, sec. 3363 (Smith-Hurd Supp. 1981); Iowa Code sec. 601A.7 (1981); Kan. Stat. Ann. sec. 39-1101 (1981); La. Rev. Stat. Ann. sec. 21:52 (1963); Me. Rev. Stat. Ann. tit. 5, secs. 4591, 4592 (1964); Md. Ann. Code art. 30, sec. 33 (Cum. Supp. 1981); Mass. Gen. Laws Ann. ch. 272, sec. 98 (West Supp. 1982); Minn. Stat. sec. 363.03(3) (1980); Miss. Code Ann. secs. 43-6-3, 43-6-5 (1981); Mo. Ann. Stat. sec. 209.150 (Vernon Supp. 1981); Mont. Code Ann. sec. 49-4-211 (1981); Neb. Rev. Stat. sec. 20-127 (Supp. 1982); Nev. Rev. Stat. sec. 651.070 (1979); N.H. Rev. Stat. Ann. sec. 167-C:2 (1977); N.J. Stat. Ann. secs. 10:5-4, 10:5-4.1 (West 1976 & Supp. 1982); N.M. Stat. Ann. sec. 28-7-

3 (1978); Pa. Stat. Ann. tit. 43, sec. 954(1) (Purdon Supp. 1981); R.I. Gen. Laws sec. 11-24-1 (1981); S.C. Code sec. 43-33-20 (1976); Va. Code sec. 63.1-171.2 (1980); Wash. Rev. Code sec. 70.84.010(3) (1981); Wyo. Stat. sec. 42-1-126 (1977).

[263] *E.g.*, Okla. Stat. Ann. tit. 7, sec. 19.1 (West Supp. 1981); P.R. Laws Ann. tit. 1, sec. 13 (1965); *see also* S.D. Comp. Laws Ann. sec. 20-13-23.1 (1979) (the right to "reasonably equal accommodations, advantages, facilities and privileges of all . . . places of public accommodation").

[264] Nev. Rev. Stat. sec. 651.050.5 (1979). *See* New York Roadrunners Club v. State Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981) (finding that a marathon course on city streets was a "place of public accommodation" under state law, but finding no discrimination against the handicapped in excluding individuals in wheelchairs from race), *aff'd*, 55 N.Y.2d 122, 447 N.Y.S.2d 908 (1982) (expressly reserving the "place of public accommodation" issue).

[265] *E.g.*, Colo. Rev. Stat. sec. 24-34-801 (Supp. 1981); N.J. Stat. Ann. sec. 10:5-5 (West 1976); N.Y. Civ. Rights Law sec. 47 (McKinney 1981); Pa. Stat. Ann. tit. 43, sec. 954(1) (Purdon Supp. 1982); Tex. Human Res. Code Ann. tit. 8, sec. 121.002(3) (Vernon 1980); Vt. Stat. Ann. tit. 13, sec. 1451(b) (Supp. 1981) (this statute extends protection in places of public accommodation only to blind or deaf persons accompanied by a guide dog).

[266] There may be problems of vagueness with the sweeping language of these statutes. *See, e.g.*, Johnson v. Regional Transportation Dist., No. 82-CV0365 (Colo. Dist. Ct., filed Jan. 20, 1982) where a state civil rights law protecting "full and equal" use of "places of public accommodation" by the handicapped (Colo. Rev. Stat. sec. 24-34-801 (Supp. 1981)) is being challenged as unconstitutionally vague and overbroad. Many of the state civil rights statutes, like the Colorado statute, provide criminal sanctions for violations.

[267] *E.g.*, Ky. Rev. Stat. Ann. sec. 258.500 (Supp. 1982); N.D. Cent. Code sec. 25-13-02 (1978); Okla. Stat. Ann. tit. 7, sec. 19.1 (West Supp. 1981); Vt. Stat. Ann. tit. 13, sec. 1451(b) (Supp. 1981).

[268] In Dady v. School Bd. of Rochester, 90 Mich. App. 381, 282 N.W.2d 328 (1979), the Michigan Court of Appeals refused to order catheterization on the basis of the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. sec. 37-1101 *et seq.* (Supp. 1981).

[269] *E.g.*, La. Rev. Stat. Ann. secs. 46:2254(A), (F) (West Supp. 1981); Minn. Stat. sec. 363-03(5) (1980); Mont. Code Ann. Sec 49-2-307 (1981); N.C. Gen. Stat. Sec. 115C-122 (3) (Supp. 1981); N.Y. Exec. Law sec. 296.4 (McKinney 1982); Or. Rev. Stat. sec. 695.150(2) (1981).

[270] *E.g.*, Conn. Gen. Stat. secs. 46a-71, 75, 76 (1981); Ill. Ann. Stat. ch. 23, sec. 343b (Smith-Hurd Supp. 1981); La. Rev. Stat. Ann. secs. 46:2254(A) (West Supp. 1981). *See also* Mass. Const. amend. art. CXIV, which contains a similar provision.

[271] *See, e.g.*, Ariz. Rev. Stat. Ann. sec. 34-401 *et seq.* (1974 & Supp. 1981); Cal. Gov. Code sec. 4450 (West 1980) (*see also* Cal. Health & Safety Code sec. 19955 *et seq.* (West Supp. 1982) which provides for access to buildings constructed with *private* funds); Conn. Gen. Stat. Ann. sec. 10-292 (West supp. 1981); Del. Code Ann. tit. 29, sec. 6917 (1975); D.C. Code Ann. sec. 6-1703 (Michie 1981); Ill. Ann. Stat. ch. 111 1/2, sec. 3701 *et. seq.* (Smith-Hurd Supp. 1981); Ind. Code Ann. sec. 22-11-1-9 (Burns Supp. 1982); Me. Rev. Stat. Ann. tit. 20, sec. 3129 (Supp. 1981) (*see also* Me. Rev. Stat. Ann. tit. 5, secs. 4593, 4594 (1964 and Supp. 1982); Mass. Gen. Laws Ann. ch. 71B, sec. 8 (West Supp. 1981); Miss. Code Ann. sec. 43-6-101 *et seq.* (1981); Neb. Rev. Stat. sec. 72-1101 (1978 & Supp. 1980); Nev. Rev. Stat. sec. 338.180 (1979); N.D. Cent. Code sec. 48-02-19 (Cum. Supp. 1981); N.H. Rev. Stat. Ann. sec. 275-C:14 (Supp. 1981); N.J. Stat. Ann. secs. 18A:18A-17, 18A:18A-

17.1 (West Supp. 1982) (*see also* N.J. Stat. Ann. secs. 52:32-4, 52:32-5 (West Supp. 1982); N.Y. Pub. Bldgs. Law sec. 50 *et seq.* (McKinney Supp. 1981); R.I. Gen. Laws sec. 37-8-15 (1981); Tenn. Code Ann. secs. 49-2913.C, 49-2954, 53-2544 (1977 & Supp. 1981); Utah Code Ann. sec. 26-29-1 *et seq.* (Supp. 1981); Vt. Stat Ann. tit. 18, sec. 1301 *et seq.* (1968 & Supp. 1981); V.I. Code Ann. tit. 17, sec. 284 (1982); W. Va. Code sec. 18-10F-1 *et seq.* (1977).

[272] 419 U.S. 565, 579 (1975). *Goss* also cited an interest in reputation as a property interest. However in *Paul v. Davis*, 424 U.S. 693, 709 (1976), the Court held that a governmentally imposed stigma, alone, did not amount to a deprivation of liberty protected by procedural due process.

[273] *E.g.*, the *Mills* court stated that "[d]ue process of law requires a hearing prior to exclusion, termination or classification into a special program." 348 F. Supp. 866, 875 (D.D.C. 1972).

[274] Lebanks v. Spears, 60 F.R.D. 135 (D. La. 1973); Stewart v. Phillips, Civ. Action No. 70-1199-F (D. Mass. 1970) (discussed in Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 Hastings L.J. 1087, 1093-1094 n. 28 [1973]).

[275] Various Supreme Court decisions since *Goss* have limited its impact. *E.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Ingraham v. Wright, 430 U.S. 651 (1977); Carey v. Piphus, 435 U.S. 247 (1978). *See generally* Note, *Due Process, Due Politics, and Due Respect: Three Models of Legitimate School Governance*, 94 Harv. L. Rev. 1106 (1981); Keim, 10 U. of Mich. J. of L. Reform 110, 117 n. 40 (1976); Jackson, Goss v. Lopez: *Revisited*, Vol. VII No. 2 Law Studies (Bureau of Social Studies Education, N.Y.S. Department of Education, 1982).

[276] 435 U.S. 78 (1978).

[277] *Id.* at 90.

[278] 442 U.S. 584 (1979).

[279] *Id.* at 601.

[280] *Id.* at 611-613.

[281] *See* Larry P. v. Riles, 495 F. Supp. 926, 933 (N.D. Cal. 1979), *appeal pending*.

[282] *See* Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634, 636-38 (S.D.Tex. 1978).

[283] *Cf.* Board of Educ. of Northport-East Northport v. Ambach, 107 Misc. 2d 830, 437 N.Y.S.2d 564, 574 (Sup. Ct. 1981), *appeal pending*.

[284] Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D. W.Va. 1976); Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46, 57-59 (N.D. Ohio 1976) (*held*, Ohio regulations for placement of handicapped children are constitutionally deficient under *Goss v. Lopez* for lack of notice, opportunity for review, and opportunity to present child's case); Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634 (S.D. Tex. 1978) (*held*, expulsion of brain-damaged child without impartial hearing is a violation of due process).

[285] 34 C.F.R. sec. 104.36 (1981).

[286] *See, e.g.*, Cal. Educ. Code secs. 56321, 56341, 56346, 56380, 56505 (West Supp. 1980); Kan. Stat. Ann. sec. 72-973 (1981); Ill. Ann. Stat. ch. 122, sec. 14-8.02 (Smith-Hurd Supp. 1981); La. Rev. Stat. Ann. sec. 17:1952 (West Supp. 1982); Minn. Stat. sec. 120.17(3b) (Supp. 1981); Neb. Rev. Stat. sec. 43-661 *et seq.* (1978 & Supp. 1980).

[287] *See* Eberle v. Board of Pub. Educ. of School Dist. of Pittsburgh, 444 F. Supp. 41,43 (D. Pa. 1977).

[288] *See* Rebell, *Implementation of Court Mandates Concerning Special Education: The Problems and the Potential*, 10 J. of L. and Educ. 335, 341, 351 (1981); Fanning and Schrant, *The Education of Handicapped Chil-*

dren: Administrative Remedies, 10 Colorado Lawyer 1886 (Aug. 1981); Budoff and Orenstein, *Special education appeals hearings: are they fair and are they helping?*, Exceptional Education Quarterly 46 (Aug. 1981); Kotin and Eager, Due Process in Special Education: A Legal Analysis 24 (1977); Schrant, Due Process in Special Education: A Pre-hearing Dispute Resolution Model (Aug. 1980) (unpublished Ph.D. dissertation, University of Denver, available from University Microfilms).

[289] Cal. Educ. Code sec. 56503 (West Supp. 1982); Conn. Gen. Stat. Ann. sec. 10-76h(b) (West Supp. 1981); Me. Rev. Stat. Ann. tit. 20, sec. 3127(3)(A) (Supp. 1981); Minn. Stat. secs. 120.17(3b)(c), 120.172 (Supp. 1981).

[290] *E.g.*, Arizona, Iowa, Michigan, Wisconsin.

[291] Minn. Stat. sec. 120.172 (Supp. 1981).

[292] 34 C.F.R. sec. 300.506 *Comment* (1981).

[293] Education Times, Aug. 3, 1981, at 4 (a California study showed that less than one-tenth of one percent of the state's 350,000 special education students participated in hearings under P.L. 94-142); Fiske, *Setback for Handicapped*, N.Y. Times, June 30, 1982, at B-2 ("statistics show that in 99.5 percent of cases, parents and local schools have been able to agree on an appropriate individualized educational program.").

[294] Pittenger & Kuriloff, *supra* note 171, at 83.

[295] 20 U.S.C. sec. 1415(b)(1)(C) (1978).

[296] *Id.*

[297] *E.g.*, Alaska Stat. sec. 14.030.191(b) (1975); Ark. Stat. Ann. sec. 80-2133 (Supp. 1981); Ariz. Rev. Stat. Ann. secs. 15-766.D(5), 15-766.E (1981 Spec. Pamphlet); Cal. Educ. Code secs. 56321, 56341, 56346, 56380 (West Supp. 1982); Colo. Rev. Stat. sec. 22-20-108 (1973 and Supp. 1981); Conn. Gen. Stat. Ann. sec. 10-76d(a) (West Supp. 1981); D.C. Rules of the Bd. of Educ., ch. 4, sec. 455 (1977); Fla. Stat. Ann. sec. 230.23(4)(m)(4) (West Supp. 1981); Ill. Ann. Stat. ch. 122, sec. 14-8.02 (Smith-Hurd Supp. 1981); Kan. Stat. Ann. sec. 72-972(a) (1981); La. Rev. Stat. Ann. sec. 17:1952 (West Supp. 1982); Me. Rev. Stat. Ann. tit. 20, sec. 3131(1-B)(C) (Supp. 1981); Md. Educ. Code Ann. sec. 8-404.1 (Cum. Supp. 1981); Mass. Gen. Laws Ann. ch. 71B, sec. 3 (West Supp. 1981); Minn. Stat. secs. 120.17(3a)(b), 120.17(3b)(a) (1980 & Supp. 1981); Nev. Rev. Stat. sec. 388.470.1(a) (1979); N.H. Rev. Stat. Ann. sec. 186-C:7 (Supp. 1981); N.J. Stat. Ann. sec. 18A:46-8 (West Supp. 1981); N.Y. Educ. Law sec. 4402.1.b (McKinney 1981); N.C. Gen. Stat. sec. 115C-110 (Cum. Supp. 1981); Ohio Rev. Code Ann. sec. 3323.05(c) (Page Supp. 1981); Or. Rev. Stat. secs. 343.157, 343.163 (1981); P.R. Laws Ann. tit. 18, sec. 1338(a) (Supp. 1980); V.I. Code Ann. tit. 17, sec. 289(3) (1982); Wis. Stat. Ann. secs. 115.80(1),(2) (West Supp. 1981). Some additional state statutes contain provisions regarding notification of parents, without making it clear whether notice must be given *before* placement determinations have been made.

[298] 20 U.S.C. sec. 1415(e)(3) (1978).

[299] *See, e.g.*, Cal. Educ. Code sec. 56505(d) (West Supp. 1982); Ill. Ann. Stat. ch. 122, sec. 14-8.02 (Smith-Hurd Supp. 1981); Md. Educ. Code Ann. sec. 8-409(d) (Cum. Supp. 1981); Minn. Stat. sec. 120.17(3b)(h) (Supp. 1981); Mo. Ann. Stat. sec. 162-955 (Vernon Supp. 1982); N.Y. Educ. Law sec. 4404.4 (McKinney 1981); N.C. Gen. Stat. sec. 115C-116(e) (Cum. Supp. 1981); Or. Rev. Stat. sec. 343-177 (1981); Tenn. Code Ann. sec. 49-2947 (Cum. Supp. 1981); V.I. Code Ann. tit. 17, sec. 289(d) (1982); Wis. Stat. Ann. sec. 115.81(3) (West Supp. 1981).

[300] *E.g.*, Cox v. Brown, 498 F. Supp. 823 (D.D.C. 1980); Erdman v. Connecticut, 3 E.H.L.R. 552:218 (D. Conn. 1980).

[301] *See* Tatro v. Texas, 516 F. Supp. 968, 978 (N.D. Tex. 1981); Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981); Walker v. Cronin, 38 N.E.2d 582 (Ill. App. 1982).

[302] *E.g.*, Missouri's special education statute provides "[i]f the health or safety of the child or other persons would be endangered by delaying the change in assignment, the change [in placement] may be sooner made . . . ." Mo. Ann. Stat. sec. 162.955 (Vernon Supp. 1982).

[303] Concerned Parents and Citizens for Continuing Educ. at Malcolm X v. New York City Bd. of Educ., 629 F.2d 751 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 858 (1981).

[304] *Id.* at 756.

[305] Dima v. Macchiarola, 513 F. Supp. 565 (E.D.N.Y. 1981).

[306] Concerned Parents and Citizens for Continuing Educ. at Malcolm X v. New York City Bd. of Educ. 629 F.2d 751, 754 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 858 (1981).

[307] *See id.* at 756.

[308] Patsel v. District of Columbia Bd. of Educ., 522 F. Supp. 535, 539 (D.D.C. 1981).

[309] 20 U.S.C. sec. 1415(b)(1)(A) (1978).

[310] *Id.*

[311] 20 U.S.C. sec. 1415 (b)(1)(B) (1978). *See* note 141, *supra*, for a list of citations to state statutory provisions for appointment of surrogate parents.

[312] 34 C.F.R. sec. 300.503 (1981).

[313] 20 U.S.C. sec. 1415(b)(2) (1978).

[314] 20 U.S.C. sec. 1415(d) (1978).

[315] 20 U.S.C. sec. 1415(b)(2) (1978).

[316] Garrity v. Gallen, 522 F. Supp. 171, 226-227 (D.N.H. 1981).

[317] Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980); *accord* Grymes v. Madden, 3 E.H.L.R. 552:183,185 (D. Del. 1981), *aff'd*, 672 F.2d 321, 323 (3rd Cir. 1982). *See* Education Daily, July 27, 1982, at 3 (employees of N.J. State Department of Education cannot be impartial hearing officers).

[318] Vogel v. School Bd. of Montrose R-14 School Dist., 491 F. Supp. 989 (W.D. Mo. 1980).

[319] *See, e.g.*, Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board allowed to decide issue of employment termination of striking teachers as "impartial" decision maker); Silvio v. Commonwealth, 439 A.2d 893 (Pa. Commw. Ct. 1982) (state employee, who was a professor at a state institution, allowed to hear cases involving termination of striking teachers); Harrell v. Wilson County Schools, 293 S.E.2d 687, 691-92 (N.C. Ct. App. 1982) (predisposition for "mainstreaming" by member of IEP panel did not amount to bias).

[320] Helms v. McDaniel, 657 F.2d 800, 806 n. 9 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1443 (1982).

[321] 20 U.S.C. sec. 1415(e)(1) (1978).

[322] Vogel v. School Bd. of Montrose R-14 School Dist., 491 F. Supp. 989, 993 (W.D. Mo. 1980); Town of Burlington v. Department of Educ. of Mass., 655 F.2d 428, 431 (1st Cir. 1981); Monahan v. Nebraska, 491 F. Supp. 1014, 1091 (D. Neb. 1980), *aff'd in part, vacated in part and remanded*, 645 F.2d 592 (8th Cir. 1981).

[323] Kan. Stat. Ann. sec. 72-973(c) (1981).

[324] Me. Rev. Stat. Ann. tit. 20, sec. 3131(1-B)(B)(1) (Supp. 1981).

[325] Alaska Stat. sec. 14.30.191(c) (1975).

[326] *See, e.g.*, School Comm., Town of Truro v. Massachusetts, 3 E.H.L.R. 552:186 (Mass. Super. Ct. 1980) (*held*, state hearing officer had authority to designate psychologist for counselling of handicapped student).

[327] In re Clover Park School Dist. No. 400, 3 E.H.L.R. 503:105, 108 (Wash. 1981); In re Newport Mesa Unified School Dist., 3 E.H.L.R. 503:186, 187 (Cal. 1982).

[328] Lane v. Arnold Pub. School Dist. #89, 3 E.H.L.R. 502:366 (Neb. 1981) (education to 24th birthday ordered because of school's failure to educate previously).

[329] In re a Handicapped Child . . . Case No. 1007[illegible], 3 E.H.L.R. 501:241 (N.Y. 1979) (compensatory education not authorized by statute or regulations); In re Fitchburg Pub. Schools, 3 E.H.L.R. 503:171 (Mass. 1981); (three week delay in providing summer program did not warrant award of compensatory educational program); In re Brookline Pub. Schools, 3 E.H.L.R. 503:204 (Mass. 1982) (compensatory education not justified by particular facts of school's noncompliance).

[330] Davis v. District of Columbia Bd. of Educ., 522 F. Supp. 1102, 1109-10 (D.D.C. 1981), *on reconsideration*, 3 E.H.L.R. 553:490 (D.D.C. 1982).

[331] 419 U.S. 565, 582 (1975).

[332] S-1 v. Turlington, 635 F.2d 342, 348 n. 9 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 566 (1981); Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979); Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978); Victoria L. v. District School Bd., No. 80-67, Civ. F.I.M.F. (N.D. Fla. Nov. 17, 1980) (a dangerous handicapped child was suspended and then, after hearings, was transferred to a more restrictive setting).

[333] Section 504 has been interpreted to prohibit disciplining a child on the basis of conduct resulting from his handicapping condition. *See* S-1 v. Turlington, 635 F.2d 342, 346 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 566 (1981); Comment, *The Rights of Handicapped Students in Disciplinary Proceedings By Public School Authorities*, 53 U. Colo. L. Rev. 367, 392 (1982).

[334] 635 F.2d at 344 n. 1.

[335] *Id.* at 346. *Accord*, Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979).

[336] S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 566 (1981) ("expulsion is still a proper disciplinary tool under the EHA and Section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.").

[337] 531 F. Supp. 148, 151 (C.D. Ill. 1982).

[338] Pratt v. Board of Educ. of Frederick County, 3 E.H.L.R. 552:363 (D. Md. 1980) (consent decree).

[339] *But see* Mich. Comp. Laws Ann. sec. 380-1311 (Supp. 1981) which requires an immediate evaluation of a misbehaving child not already identified as handicapped, when he is "guilty of gross misdemeanor or persistent disobedience," when there is reason to believe he is handicapped.

[340] *See, e.g.*, Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979) (applying the Minnesota Pupil Fair Dismissal Act to the suspension of an emotionally disturbed child who had not been officially identified as "handicapped," under either state or federal law, at the time of her suspension).

[341] Southeast Warren Community School Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, 180 (Iowa 1979).

[342] Minn. Stat. Ann. sec. 127.28 (1979).

[343] Conn. Gen. Stat. Ann. sec. 10-233d (Supp. 1981); Or. Rev. Stat. sec. 339.250 (1980); *see also* Minn. Stat. Ann. sec. 127.27(10) (West 1979) (alternative program during period of *suspension*).

[344] N.C. Gen. Stat. Ann. sec. 115C-112 (Cum. Supp. 1981).

[345] *See, e.g.*, Education Daily, July 17, 1981, at 5-6; Education Week, Feb. 24, 1982, at 17.

[346] *See* Education Daily, Feb. 16, 1982, at 4.

[347] For P.L. 94-142, *see* 20 U.S.C. sec. 1414 (withholding from local agency), sec. 1416 (witholding from state agency) (1978). For Section 504, *see* 29 U.S.C. sec. 794a(2) (Supp. 1981).

[348] *E.g.*, Ariz. Rev. Stat. Ann. sec. 15-769.C (1981 Spec. Pamphlet); Conn. Gen. Stat. Ann. sec. 10-186(a) (West Supp. 1981); Ill. Ann. Stat. ch. 122, sec. 14-13.01 (Smith-Hurd Supp. 1981); Ky. Rev. Stat. Ann. sec. 157.224(2) (Cum. Supp. 1980); Me. Rev. Stat. Ann. tit. 20, sec. 3127(4)(c)(1) (Supp. 1981); Mich. Comp. Laws Ann. sec. 380.1702(3)(4) (Supp. 1982); Mo. Ann. Stat. sec. 162.705(4) (Vernon Supp. 1982); Neb. Rev. Stat. sec. 43-6742 (1978); Nev. Rev. Stat. sec. 388.520(3) (1979); Pa. Stat. Ann. tit. 24, sec. 13-1372(5) (Purdon Supp. 1981); Tenn. Code Ann. sec. 49-2949 (Cum. Supp. 1981); Va. Code sec. 22.1-214(e) (1981); Vt. Stat. Ann. tit. 16, sec. 2944(a) (Supp. 1981); Wash. Rev. Code sec. 28A.13.080 (1981).

[349] "A decision to terminate funding of a non-complying recipient could work to the disadvantage of a complainant like [the plaintiff student], since such a cut-off could guarantee that no further services accrue to the complaining party." Camenisch v. University of Texas, 616 F.2d 127, 135 (5th Cir. 1980), *vacated on other grounds*, 101 S.Ct. 1830 (1981); *accord*, Patton v. Dumpson, 498 F. Supp. 933, 939 (S.D.N.Y. 1980). Even the Supreme Court has noted, with respect to the parallel fund-cutoff remedy under Title IX, that such a threat is too drastic to be of much practical significance. Cannon v. University of Chicago, 441 U.S. 677, 704-705 & n. 38 (1979). *Cf.* Mirga, "E.D. To Withold Funds From Mississippi District", Education Week, March 31, 1982, at 10 (announcing cutoff of federal funds to a local school district for race discrimination in violation of Title VI, for the first time since 1972).

[350] *See, e.g.*, Ezratty v. Puerto Rico, 648 F.2d 770, 777 (1st Cir. 1981) (HEW withheld P.L. 94-142 funds in Puerto Rico for a period of time).

[351] 20 U.S.C. sec. 1415(e) (1978).

[352] 101 S. Ct. 1531 (1981). For further analysis of the decision, *see* Citron, *Judicial Limitations of Federal "Rights" — The* Pennhurst *decision*, 7 Footnotes [illegible] (Footnote No. 71, 1981) [Footnotes is published by the Education Commission of the States].

[353] U.S. Const. art. I, sec. 8, cl. 1.

[354] 101 S. Ct. 1531, 1545 (1981).

[355] Board of Educ. of Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034, 3049-50 n. 26 (1982). *See also* at 3042 n. 11.

[356] McCowen v. Hahn, 3 E.H.L.R. 553:131, 134-35 (N.D. Ill. 1981).

[357] *E.g.*, William S. v. Gill, 3 E.H.L.R. 553:621, 624-25 (N.D. Ill. 1982); Parks v. Pavkovic, 3 E.H.L.R. 553:610, 613 n. 12 (N.D. Ill. 1982).

[358] Cort v. Ash, 422 U.S. 66 (1975).

[359] Miener v. Missouri, 673 F.2d 969, 974 n. 4 (8th Cir. 1982), *cert. denied sub nom.* Special School Dist. of St. Louis County v. Miener, 51 U.S.L.W. 3280 (Oct. 12, 1982) (No. 82-61); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1378-80 (10th Cir. 1981); Doe v. New York University, 666 F. 2d. 761 (2d Cir. 1981) (post-*Pennhurst* finding there is a private action under Section 504, with no mention of *Pennhurst*). But, several district courts have expressed their puzzlement over the application of *Pennhurst* to Section 504. Tatro v. Texas, 516 F. Supp. 968, 984-85 (N.D. Tex. 1981); Ruth Anne M. v. Alvin Independent School Dist., 3 E.H.L.R. 553:565, 572 n. 8 (S.D. Tex. 1982). Many pre-*Pennhurst* cases have held there is a private action under Section 504, including every federal appellate court to consider the question. *See* Kling v. Los Angeles, 633 F.2d 876 (9th Cir. 1980); Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1830 (1981); Lloyd v. Regional Transp. Authority, 548 F.2d 1277 (7th Cir. 1977); United Handicapped Federation v. Andre,

558 F.2d 413 (8th Cir. 1977). For an exhaustive listing of district court cases, *see* Pushkin v. Regents of the Univ. of Colo., 658 F.2d at 1377.

[360] *E.g.*, Hurley v. Allied Chemical Corp., 262 S.E.2d 757 (W. Va. 1980). After extensive analysis, the court concluded that a state civil rights statute, which prohibits discrimination on the basis of receipt of mental health services, creates an implied private cause of action. *See generally* Note, *Implied Causes of Action in State Courts*, 30 Stan. L. Rev. 1243, 1261 (1978) ("[t]he law governing the implication of private actions in state courts is currently in disarray.").

[361] Ogden v. Kelley, 594 S.W.2d 702 (Tenn. 1980) (judicial review of handicapped child's placement is governed by the state Uniform Administrative Procedures Act.)

[362] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1,42 (1973).

[363] Ezratty v. Puerto Rico, 648 F.2d 770 (1st Cir. 1981); Riley v. Ambach, 668 F.2d 635 (2d Cir. 1981); Davis v. Maine Endwell Cent. School Dist., 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 3080 (1981); Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980); Akers v. Bolton, 531 F. Supp. 300 (D. Kan. 1981); H.R. v. Hornbeck, 524 F. Supp. 215, 218 (D. Md. 1981); Sessions v. Livingston Parish School Bd., 501 F. Supp. 251 (M.D. La. 1980); Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979); Doe v. Anrig, 500 F. Supp. 802 (D. Mass. 1980); Stubbs v. Kline, 463 F. Supp. 110 (W.D. Pa. 1978).

[364] *E.g.*, Monahan v. Nebraska, 491 F. Supp. 1074, 1086 (D. Neb. 1980), *aff'd in part, vacated in part and remanded*, 645 F.2d 592 (8th Cir. 1981) (exhaustion not required where state administrative procedures intrinsically violate P.L. 94.142); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979) (exhaustion not required where the state did not appoint an impartial hearing officer as required by P.L. 94-142); Armstrong v. Kline, 476 F. Supp. 583, 601 (E.D. Pa. 1979), *remanded on other grounds sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1109 (1981) (exhaustion not required where the state has conclusively adopted a policy to deny services which ought to be provided under P.L. 94-142).

[365] Riley v. Ambach, 668 F.2d 635 (2d Cir. 1981). *See also*, Ezratty v. Puerto Rico, 648 F.2d 770, 775 (1st Cir. 1981) (even where "it was the agency's fault that administrative remedies were not exhausted in the first place," the court found "special circumstances" why the administrative agency should have another chance).

[366] Patsy v. Board of Regents, 102 S. Ct. 2557 (1982); McNeese v. Board of Educ., 373 U.S. 668 (1963); Larry P. v. Riles, 495 F. Supp. 926, 963 (N.D. Cal. 1979), *appeal pending*. The Supreme Court has consistently stressed that because of the federal courts' "paramount role in protecting constitutional rights", administrative procedures need *not* be resorted to prior to asserting violation of those rights in federal court. Patsy v. Board of Regents, 102 S. Ct. at 2561.

[367] Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1380-82 (10th Cir. 1981); Camenisch v. University of Texas, 616 F.2d 127, 135 (5th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1830 (1981); Kling v. Los Angeles, 633 F.2d 876, 879 (9th Cir. 1980); Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 105, 123 (D. Colo. 1981); Patton v. Dumpson, 418 F. Supp. 933, 939 (S.D.N.Y. 1980).

[368] Camenisch v. University of Texas, 616 F.2d 127, 135 (5th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1830 (1981). Courts have relied on the Supreme Court's reasoning that exhaustion is not required for a claim of sex discrimination under Title IX (Cannon v. University of Chicago, 411 U.S. 677, 706-08 & n. 48 [1979]), since Section 504's enforcement proce-

dures were modeled on those of Title IX. Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 105, 123 (D. Colo. 1981). *But see* 34 C.F.R. sec. 104.36 (1981) (Section 504 regulations) which requires schools to provide due process hearings analogous to procedures under P.L. 94-142.

[369] Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1381 (10th Cir. 1981); *accord*, Patton v. Dumpson, 498 F. Supp. 933,939 (S.D.N.Y. 1980); *contra*, Sherer v. Waier, 457 F. Supp. 1039, 1045-46 (W.D. Mo. 1978); Doe v. New York Univ., 442 F. Supp. 522 (S.D.N.Y. 1978) (denial of preliminary injunction).

[370] H.R. v. Hornbeck, 524 F. Supp. 215, 221-22 (D. Md. 1981) (Constitution and Section 504); Sessions v. Livingston Parish School Bd., 501 F. Supp. 251, 254-255 (M.D.La. 1980) (Constitution and Section 1983); Harris v. Campbell, 472 F. Supp. 51, 55 (E.D.Va. 1979) (Section 504).

[371] Sessions v. Livingston Parish School Bd., 501 F. Supp. at 253; Harris v. Campbell, 482 F. Supp. at 53-54.

[372] 20 U.S.C. sec. 1415(e)(2) (1978) provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, *shall hear additional evidence at the request of a party*, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." (emphasis added). *See* Kruelle v. New Castle County School Dist., 642 F.2d 687, 692 n.16 (3rd Cir. 1981); Tokarcik v. Forest Hills School Dist., 3 E.H.L.R 552:513, 521 (3rd Cir. 1981), *cert. denied sub nom.* Scanlon v. Tokarcik, 102 S. Ct. 3508 (1982); Age v. Bullitt County Pub. Schools, 673 F.2d 141, 144 (6th Cir. 1982).

[373] Moran v. Board of Directors, School Dist. of Kansas City, 584 S.W.2d 154, 161-62 (Mo. App. 1979) (reversing trial court's rejection of school board's placement decision for a retarded student); West Chester Area School Dist. v. Commonwealth, 43 Pa. Commw. Ct. 14, 401 A.2d 610, 612 (1979) (upholding Secretary of Education's decision that day school was the "appropriate" placement for socially and emotionally disturbed child).

[374] Independent School Dist. v. Pautz, 295 N.W.2d 635, 637 (Minn. 1980) (issue concerned appropriate placement under state special education statute of child with Downs Syndrome). The court found it important to "show deference to . . . technical training, education and expertise."

[375] *See* Town of Burlington v. Department of Educ. of Mass., 655 F.2d 428, 431 n. 4 (1st Cir. 1981). In other conflicts of state law with P.L. 94-142, courts have refused to apply particularly short state time limits for filing claims (statutes of limitation) which are based on P.L. 94-142 when incompatible with the objectives of P.L. 94-142. Tokarcik v. Forest Hills School Dist., 3 E.H.L.R. 552:513, 524 (3rd Cir. 1981), *cert. denied sub nom.* Scanlon v. Tokarcik, 102 S. Ct. 3508 (1982); Monahan v. Nebraska, 491 F. Supp. 1074, 1084-85 (D. Neb. 1980), *aff'd in part, vacated in part and remanded*, 645 F.2d 592 (8th Cir. 1981).

[376] Town of Burlington v. Department of Educ. of Mass., 655 F.2d 428, 431-32 (1st Cir. 1981).

[377] Vogel v. School Bd. of Montrose R-14 School Dist., 491 F. Supp. 989, 993 (W.D. Mo. 1980); Tokarcik v. Forest Hills School Dist., 3 E.H.L.R. 552:513, 522 (3rd Cir. 1981), *cert. denied sub nom.* Scanlon v. Tokarcik, 102 S. Ct. 3508 (1982); San Francisco Unified School Dist. v. California, 3 E.H.L.R. 553:688, 691-693 (Cal. Ct. App. 1982).

[378] For cases based on P.L. 94-142, *see, e.g.*, Kruelle v. New Castle County School Dist., 642 F.2d 687 (3rd Cir. 1981) (residential placement ordered); Tokarcik v. Forest Hills School Dist., 3 E.H.L.R. 553:513 (3rd Cir. 1981), *cert. denied sub nom.* Scanlon v. Tokarcik, 102 S. Ct. 3508 (1982) (school ordered to provide clean intermittent catheterization); Laura M. v. Special School District No. 1, 3 E.H.L.R. 552:152 (D. Minn. 1980) (new IEP

ordered to include specific services); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47 (N.D. Ala. 1981) (modifications in IEP ordered). For cases based on Section 504, *see, e.g.*, Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978), *vacated and remanded on other grounds*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2336 (1981) (athletic league ordered not to exclude handicapped student from football program); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W.Va. 1976) (school ordered to admit child with spina bifida to public classroom pending the lawsuit, with any attempt at interim exclusion to be subject to prior review by the court); Camenisch v. University of Texas, 617 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 101 S.Ct. 1830 (1981) (university ordered to provide interpreter services); and, *see* cases listed in Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1377 & n.2 (10th Cir. 1981).

[179] *E.g.*, Board of Educ. v. Assessor of Worcestor, 368 Mass. 511, 333 N.E.2d 450 (1975) (state board of education sued a local district which allocated state special education funds to reduce school taxes rather than to improve special education programs).

[180] Zvi D. v. Ambach, 3 E.H.L.R. 553:200, 204 (E.D.N.Y. 1981); Vander-Malle v. Ambach, 673 F.2d 49, 52-53 (2d Cir. 1982).

[181] Tokarcik v. Forest Hills School Dist., 3 E.H.L.R. 552:513, 524 (3rd Cir. 1981), *cert. denied sub nom.* Scanlon v. Tokarcik, 102 S. Ct. 3508 (1982).

[182] Monahan v. Nebraska, 645 F.2d 591, 597-99 (8th Cir. 1981); Cox v. Brown, 498 F. Supp. 823, 828-29 (D.D.C. 1980); North v. District of Columbia Board of Educ., 471 F. Supp. 136, 141-42 (D.D.C. 1979); Erdman v. Connecticut, 3 E.H.L.R. 552:218, 219 (D. Conn. 1980).

[183] Ely v. Howard County Bd. of Educ., 3 E.H.L.R. 553:288 (D. Md. 1982).

[184] Davis v. District of Columbia Bd. of Educ., 552 F. Supp. 102 (D.D.C. 1981).

[185] Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47 (N.D. Ala. 1981); Mattie T. v. Holladay, 3 E.H.L.R. 551:109, 118 (N.D. Miss. 1978) (consent decree); North Carolina Ass'n of Retarded Citizens v. North Carolina, Civ. Action No. 120.3050 (D.N.C. 1978) (consent decree); Morris v. McKay, No. 80-2-02559-6 (Yakima County Super. Ct., Wash., Feb. 19, 1982), *appeal pending* (school ordered to pay past and future tutorial costs after graduation).

[186] Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 56 (N.D. Ala. 1981).

[187] Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Hunter v. Board of Educ. of Montgomery County, 292 Md. 481, 439 A.2d 582 (1982); Hoffman v. Board of Educ. of New York City, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352 (1979); *cf.* Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981) (claim of negligent failure to teach "does not rise to the level of a constitutional claim").

[188] Hoffman v. Board of Educ. of New York City, 49 N.Y.2d at 127, 424 N.Y.S.2d at 379, 400 N.E. 2d at 320.

[189] Education Daily, Feb. 24, 1981, at 5-6 (arguing that the more specific and detailed the IEP, the more likely it is to look like a contract to achieve specific results, rather than a statement of general goals); Remsburg, *Liability For Wrongful Identification, Evaluation or Placement — Is There Malpractice?*, School and The Law of the Handicapped (Revised Edition) 144 (National School Boards Association, Council of School Attorneys, 1981).

[190] Anderson v. Thompson, 658 F.2d 1205, 1211 (7th Cir. 1981); *accord*, Powell v. Defore, 3 E.H.L.R. 553:293, 296 (M.D. Ga. 1982).

[191] 20 U.S.C. sec. 1415(e)(2) (1978).

[192] Anderson v. Thompson, 658 F.2d at 1213-1214; Miener v. Missouri, 673 F.2d 969, 979-80 (8th Cir. 1982), *cert. denied sub nom.* Special School Dist.

of St. Louis County v. Miener, 51 U.S.L.W. 3280 (Oct. 12, 1982) (No. 82-61); Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979); Powell v. Defore, 3 E.H.L.R. 552:293, 295-96 (M.D. Ga. 1982).

[393] Blomstrom v. Massachusetts Dep't of Educ., 3 E.H.L.R. 553:627, 630 (D. Mass. 1982).

[394] Stemple v. Board of Educ. of Prince George's County, 623 F.2d 893, 898 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1348 (1981); VanderMalle v. Ambach, 673 F.2d 49, 52 (2d Cir. 1982); Hessler v. State Bd. of Educ. of Md., 3 E.H.L.R. 553:262 (D. Md. 1981); Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142 (D.D.C. 1981); Monahan v. Nebraska, 645 F.2d 592, 598 (8th Cir. 1981); Zvi v. Ambach, 3 E.H.L.R. 553:200, 203-04 (E.D.N.Y. 1981). *Contra*, Walker v. Cronin, 438 N.E.2d 582 (Ill. App. 1982).

[395] *See* VanderMalle v. Ambach, 673 F.2d 49, 53 (2d Cir. 1982); Welsch v. Pennsylvania Dep't of Educ., 42 Pa. Commw. Ct. 41, 400 A.2d 234 (1979).

[396] Anderson v. Thompson, 658 F.2d 1205, 1211 (7th Cir. 1981); Miener v. Missouri, 673 F.2d 969, 979-80 (8th Cir. 1982), *cert. denied sub nom.* Special School Dist. of St. Louis County v. Miener, 51 U.S.L.W. 3280 (Oct. 12, 1982) (No. 82-61); Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257, 1261 (N.D.N.Y. 1982); Loughran v. Flanders, 470 F. Supp. 110, 115 (D. Conn. 1979).

[397] Anderson v. Thompson, 658 F.2d at 1214; Tatro v. Texas, 516 F. Supp. 968, 978 (N.D. Tex. 1981); Ruth Anne M. v. Alvin Independent School Dist., 3 E.H.L.R. 553:565, 569 (S.D. Tex. 1982); Walker v. Cronin, 438 N.E.2d 582 (Ill. App. 1982) (on basis of state special education statute).

[398] Anderson v. Thompson, 658 F.2d at 1214. *See also* Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142, 1146 (D.D.C. 1981) where the court explained that "self-help" may be sanctioned "in some exceptional cases, with unique factual occurrences, where the parent has exhausted all other avenues of relief or other considerations of justice compel it."

[399] Miener v. Missouri, 673 F.2d 969, 978 (8th Cir. 1982), *cert. denied sub nom.* Special School Dist. of St. Louis v. Miener, 51 U.S.L.W. 3280 (Oct. 12, 1982) (No. 82-61); Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 949 (D.N.J. 1980).

[400] Ruth Anne M. v. Alvin Independent School Dist., 3 E.H.L.R. 553: 565, 574 (S.D. Tex. 1982); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979); Powell v. Defore, 3 E.H.L.R. 553:293, 296 (M.D. Ga. 1982).

[401] *See* Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981) where the Seventh Circuit relied on *Pennhurst* to rule that damages are not authorized for Title IX claims of sex discrimination. A vigorous dissent distinguished *Pennhurst*.

[402] 42 U.S.C. sec. 1983 (1981). The full scope of the statute continues to be litigated today; *see, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980). The Supreme Court has also warned that Section 1983 does not establish substantive rights, but is only a vehicle for redressing violations of rights derived from other sources. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979); *see* Great American Fed. S. & L. Ass'n v. Novotny, 422 U.S. 366, 381-82 (1979) (Stevens, J., concurring).

[403] *E.g.*, Conn. Gen. Stat. sec. 46a-58 (1981); Neb. Rev. Stat. sec. 20-148 (1978).

[404] 101 S. Ct. 1531, 1545 (1981).

[405] Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2626-27 (1981).

[406] 101 S. Ct. at 2626.

[407] These courts have ruled that P.L. 94-142's remedies were intended to be exclusive and that therefore Section 1983 was not available. Anderson v. Thompson, 658 F.2d 1205, 1215 (7th Cir. 1981); Hessler v. State Bd. of Educ.

of Md., 3 E.H.L.R. 553:262, 264 (D. Md. 1981); Powell v. Defore, 3 E.H.L.R. 553:293, 297 (M.D. Ga. 1982); Ruth Anne M. v. Alvin Independent School Dist., 3 E.H.L.R. 553: 565, 574-576 (S.D. Tex. 1982); H. R. v. Hornbeck, 524 F. Supp. 215, 222-23 (D. Md. 1981).

[408] Edelman v. Jordan, 415 U.S. 651 (1974).

[409] *Cf.* the following state government immunity statutes, Colo. Rev. Stat. sec. 24-10-101 *et seq.* (1973 & Supp. 1981); Fla. Stat. Ann. sec. 768.28 (Supp. 1981).

[410] Stubbs v. Kline, 463 F. Supp. 110, 115-116 (W.D. Pa. 1978) (regarding Section 504); Ezratty v. Puerto Rico, 648 F.2d 770, 776-777 (1st Cir. 1981) (regarding P.L. 94-142); Miener v. Missouri, 673 F.2d 969, 981-82 (8th Cir. 1982) (regarding P.L. 94-142), *cert. denied sub nom.* Special School Dist. of St. Louis County v. Miener, 51 U.S.L.W. 3280 (Oct. 12, 1982) (No. 82-61). In the following handicap cases, damages were denied because of sovereign immunity: Riley v. Ambach, 508 F. Supp. 1222, 1248, (E.D. N.Y. 1980), *rev'd on other grounds*, 668 F.2d 635 (2d Cir. 1981); Hessler v. State Bd. of Educ. of Md., 3 E.H.L.R. 553: 262, 264 (D.Md. 1981). *See generally* Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("The mere fact that a state participates in a program through which the Federal government provides assistance . . . is not sufficient to establish consent on the part of the state to be sued in the federal courts."); Association for Retarded Citizens of N.D. v. Olson, Civ. Action No. A1-80-141 (D.N.D., Sept. 26, 1980) (*held*, without analytical comment, that because of the eleventh amendment, the state could not be a defendant in a class action concerning the treatment of mentally retarded children and adults).

[411] Prospective relief is permitted even though the effect of the relief ordered may be the future expenditure of state funds. *Ex Parte* Young, 209 U.S. 123 (1908); Edelman v. Jordan, 415 U.S. at 667-68; Helms v. McDaniel, 657 F.2d 800, 806 n. 10 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1443 (1982); New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27, 39 (2d Cir. 1979), *cert. denied sub nom.* Coughlin v. New York State Ass'n for Retarded Children, 444 U.S. 836 (1979).

[412] Monell v. Department of Social Services, 436 U.S. 658, 690 n. 54 (1978).

[413] Ezratty v. Puerto Rico, 648 F.2d 770, 777 (1st Cir. 1981).

[414] Stubbs v. Kline, 463 F. Supp. 110, 115 (W.D. Pa. 1978).

[415] Wood v. Strickland, 420 U.S. 308, 321 (1975).

[416] Wood v. Strickland, 420 U.S. at 321; Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634, 638 (S.D. Tex. 1978) (the required good faith interpreted to exclude gross ignorance of "settled indisputable law").

[417] Howard S. v. Friendswood Independent School Dist., 454 F. Supp. at 638.

[418] *Id.*

[419] Stubbs v. Kline, 463 F. Supp. 110, 115 (W.D. Pa. 1978); *accord* Hutchings v. Erie City and County Library Bd. of Directors, 516 F. Supp. 1265, 1272 (W.D.Pa. 1981) (denial of summary judgment in claim by handicapped library employee).

[420] Hunter v. Board of Educ. of Montgomery County, 292 Md. 481, 439 A.2d 582, 587 (1982) (warning that individual educators are not shielded when they intentionally injure a child). *See also* Sherer v. Waier, 457 F. Supp. 1039, 1047 (W.D. Mo. 1978).

[421] Patton v. Dumpson, 498 F. Supp. 933, 943-44. (S.D.N.Y. 1980).

[422] Monnell v. Department of Social Services, 436 U.S. 658, 694 (1978).

[423] Patton v. Dumpson, 498 F. Supp. at 943.

[424] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

[425] Anderson v. Thompson, 658 F.2d 1205, 1217 (7th Cir. 1981); Hymes v. Harnett County Bd. of Educ., 664 F. 2d 410 (4th Cir. 1981); Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403 (E.D.N.C. 1980); Tatro v. Texas, 516

F. Supp. 968, 981 (N.D. Tex. 1981); Patsel v. District of Columbia Bd. of Educ., 3 E.H.L.R. 553:495, 496 (D.D.C. 1982).

[126] 29 U.S.C. sec. 794(a) (Supp. 1981) (Section 504); 42 U.S.C. 1988 (1976) (Section 1983).

[127] Courts have split as to whether a claimant in a P.L. 94-142 action can obtain attorney's fees on the basis of Section 504. Some courts have allowed attorney's fees where the facts underlying the P.L. 94-142 claim amounted to a violation of Section 504 as well. Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 57 (N.D. Ala. 1981); Tatro v. Texas, 516 F. Supp. 968, 985 (N.D. Tex. 1981) (the court warned that it was reluctant to make this decision); Patsel v. District of Columbia Bd. of Educ., 3 E.H.L.R. 553:495 (D.D.C. 1982); Davis v. District of Columbia Bd. of Educ., 3 E.H.L.R. 553:494 (D.D.C. 1982); Harris v. District of Columbia Bd. of Educ., 3 E.H.L.R. 553:269, 272 (D.D.C. 1981) (attorney's fees granted although the claim was originally based on P.L. 94-142, when there was an independent violation of Section 504). But, attorney's fees were denied where the case had been treated as based on P.L. 94-142 throughout the proceedings. Anderson v. Thompson, 658 F.2d 1205, 1217 n.20 (7th Cir. 1981); Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403, 409 (E.D.N.C. 1980).

[128] Anderson v. Thompson, 658 F.2d 1205, 1217 (7th Cir. 1981). *Accord*, Noe v. Ambach, 542 F. Supp. 70, 73 (S.D.N.Y. 1982); Tatro v. Texas, 516 F. Supp. 968, 984 (N.D. Tex.1981). *Contra*, Hymes v. Harnett, 664 F.2d 410, 413 (4th Cir. 1981) (permitting attorney's fees on the basis of Section 1988 in an action based on P.L. 94-142 because the particular facts involved made this a "hybrid" case); Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982) (granting attorney's fees under 42 U.S.C. sec. 1988 in an action based on P.L. 94-142, without discussion of the interrelationship of the two laws); Turillo v. Tyson, 535 F. Supp. 577, 582-83 (D.R.I. 1982) (granting attorney's fees on the basis of Section 1988 for work performed in administrative proceedings under P.L. 94-142); Gary B. v. Cronin, 542 F. Supp. 102, 120-121 (N.D. Ill. 1982) (granting attorney's fees on the basis of Section 1988 where a substantial constitutional claim had been asserted along with the P.L. 94-142 claim, which was settled).

[129] *See generally* Note, *Damage Awards for Constitutional Torts: A Reconsideration after* Carey v. Piphus, 93 Harv L. Rev. 966 (1980).

[130] Doe v. Marshall, 622 F.2d 118, 120 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2336 (1981).

[131] Fells v. Brooks, 3 E.H.L.R. 552:302 (D.D.C. 1981); Hilden v. Evans, 3 E.H.L.R. 552:299 (D. Or. 1980); *see* Maher v. Gagne, 448 U.S. 122 (1980).

[132] Hilden v. Evans, 3 E.H.L.R. 552:299 (D. Or. 1980). However, the Supreme Court has agreed to decide whether attorney's fees should be reduced proportionately when plaintiffs win less than all issues in their lawsuit. Hensley v. Eckerhart, 664 F.2d 294 (8th Cir. 1981), *cert. granted*, 102 S. Ct. 1610 (1982).

[133] Arrington v. Prince William County, 3 E.H.L.R. 552:358 (E.D. Va. 1981).

[134] Turillo v. Tyson, 535 F. Supp. 577, 583 (D.R.I. 1982); Hilden v. Evans, 3 E.H.L.R. 552:299, 301 (D. Or. 1980).

[135] *See, e.g.*, Mattie T. v. Holladay, 522 F. Supp. 72 (N.D. Miss. 1981); Tatro v. Texas, 516 F. Supp. 968, 986-87 (N.D. Tex. 1981); Fells v. Brooks, 3 E.H.L.R. 552:302 (D.D.C. 1981); Hilden v. Evans, 3 E.H.L.R. 552:299 (D. Or. 1980); Department of Educ. v. Valenzuela, 3 E.H.L.R. 553:221 (D. Hawaii 1981).

[136] Capello v. District of Columbia Bd. of Educ., 3 E.H.L.R. 553:695, 697 (D.D.C. 1982).

[137] One lower court observed:

> the EAHCA [P.L. 94-142] gives courts broad authority to pre-

> scribe details of educational policy in individual cases, and a Judge can presumably order implementation of whatever program he or she deems appropriate. . . . A state's autonomy in regulating the education of its handicapped children is thus to a great extent fettered by the conditions imposed upon it due to the receipt of EAHCA funds.

Espino v. Besteiro, 520 F. Supp. 905, 913 (S.D.Tex. 1981). Several writers have warned that P.L. 94-142 is "altering the historic balance of power between the states and the local school systems," and is disrupting state government operations. Pittenger & Kuriloff, *supra* note 171, at 83; *see also* Education Daily, June 24, 1981, at 3, and Aug. 19 1980, at 5; P.L. 94-142: A Study of Implementation and Impact at the State level, Executive Summary, at 4 (Education Turnkey Systems, Inc., 1981). One state bill was very blunt:

> [T]he legislature finds that P.L. 94-142 and the implementing regulations are: (1) inconsistent with Wyoming's policy of allowing the greatest degree of local autonomy, (2) unduly burdensome in the reporting and other requirements they establish and (3) overly eager to "mainstream" handicapped children where it may be inappropriate. Therefore, this act is adopted to promote local control and efficient and effective government, while guaranteeing the rights of handicapped children.

House Bill No. 327 in the State of Wyoming, 1981. The bill did not pass.

[438] 20 U.S.C. sec. 1412(6) (1978). Coincident with the imposition of state responsibility by P.L. 94-142, there has been an independent trend toward increasing *state* financing of education, *vis-a-vis local* financing. State contributions exceeded local for the first time in 1979-80, when local governments contributed 43.4 percent of the education dollar, while states contributed 46.8 percent (the federal government contributed 9.8 percent). Education Daily, March 25, 1982, at 1. Average expenditures for *special* education are about 55 percent from states; 31 percent, local agencies; and 14 percent federal government. U.S. Dep't of Health, Education & Welfare, *supra* note 2, at 113.

[439] Kruelle v. New Castle County School Dist., 642 F.2d 687, 697 (3rd Cir. 1981).

[440] Association for Retarded Citizens in Colo. v. Frazier, 517 F. Supp. 105, 124 (D. Colo. 1981).

[441] While Congress has authorized spending up to 40 percent of estimated costs, actual appropriations have been only about 11 percent. Fleming, *Congressional Developments*, 7 Footnotes 5, 6 (Footnote No. 72, 1981); Pittenger & Kuriloff, *supra* note 171, at 87; Education Daily, Oct. 2, 1980, at 3-4. *See also* (Editorial) N.Y. Times, July 3, 1982, at 20: "If 'appropriate' means 'optimal,' let Congress say so explicitly — after full consideration of the fiscal consequences. As it happened, Congress cavalierly imposed the special education mandate, only to renege on its promised share of the soaring cost." Recently the Supreme Court of Illinois, for example, expressed its "overriding concern as to how to implement a Federal program [P.L. 94-142] which arguably mandates comprehensive care plans without providing sufficient resources for implementation." Claudia K. v. School Dist. No. 118, 3 E.H.L.R. 553:651, 654 (Ill. 1982), *rev'g* 3 E.H.L.R. 552:501 (Ill. County Ct. 1981) (setting aside court order of residential placement for psychiatrically disturbed high school student, because the difficult questions raised made such an order inappropriate).

[442] 426 U.S. 833, 847 (1976) (*held*, federal wage and hour standards for state employees violate the tenth amendment). The deficient law took away "the States' freedom to structure integral operations in areas of traditional

governmental functions." *Id.* at 852. Congress had relied on its authority to regulate interstate commerce. The Court declined to address whether the tenth amendment limits statutes based on other Congressional powers, such as the spending power or the enforcement clause of the fourteenth amendment. *Id.* at 852 n. 17. For a discussion of the issues raised, *see* Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977).

[143] The Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. secs. 6000 *et. seq.* (1977 and Supp. 1981).

[144] 101 S. Ct. 1531, 1540 (1981).

[145] *Id.* at 1539-40.

[146] Miener v. Missouri, 673 F.2d 969, 974 n. 4 (8th Cir. 1982), *cert. denied sub nom.* Special School Dist. of St. Louis County v. Miener, 51 U.S.L.W. 3280 (Oct. 12, 1982) (No. 82-61).

[147] *See, e.g.*, Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A-1.

[148] McGuire, State and Federal Programs for Special Student Populations (Education Commission of the States, 1982).

Tables

Table I

The Education Clauses in State Constitutions

Every state constitution contains at least one education clause. This table includes the clause or clauses (1) requiring a public school system, (2) concerning the care and education of the handicapped and (3) prohibiting discrimination in education. Other clauses, such as prohibitions on aid to sectarian schools, are not included. The basic clauses can be categorized into three general types, although some could fit under more than one category. The categories are: "free public schools open to all" (South Carolina); a "thorough and efficient" requirement (New Jersey); and, finally, more generalized language (New Hampshire). All language listed below is quoted directly from the state constitutions. *See* the text in Chapter II for an analysis of these provisions.

Alabama

The legislature shall establish, organize and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and 21 years. . . . *Ala. Const. art. 14, sec. 256.*

Alaska

The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution. *Alaska Const. art. VII, sec. 1.*

American Samoa

The government shall operate a system of free and non-sectarian public education. The government will also encourage qualified persons of good character to acquire further education, locally and abroad, both general and technical, and thereafter to return to American Samoa to the end that the people thereof may be benefited. *A.S. Rev. Const. art. 1, sec. 15.*

Arkansas

[T]he State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction. *Ark. Const. art. 14, sec. 1.*

It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb and the blind, and also for the treatment of the insane. *Ark. Const. art. 19, sec. 19.*

Arizona

The University and all other State educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible. The Legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years. *Ariz. Const. art. II, sec. 6.*

The Legislature shall also enact such laws as shall provide for the education and care of the deaf, dumb and blind. *Ariz. Const. art. II, sec. 1.*

California

The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . . . *Cal. Const. art. 9, sec. 5.*

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement. *Cal. Const. art. 9, sec. 1.*

Colorado

The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. *Colo. Const. art. IX, sec. 2.*

Educational, reformatory and penal institutions, and those for the benefit of the insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the state, in such manner as may be prescribed by law. *Colo. Const. art. VIII, sec. 1.*

Connecticut

There shall always be free public elementary and secondary schools in the state. *Conn. Const. art. 8, sec. 1.*

Delaware

The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means. *Del. Const. art. X, sec. 1.*

The General Assembly, notwithstanding any other provision of this Constitution, may provide by an Act of the General Assembly, passed with the concurrence of a majority of all the members elected to each House, for the transportation of students of non-public, non-profit Elementary and High schools. *Del. Const. art. X, sec. 5.*

District of Columbia

The control of the public schools in the District of Columbia is vested in a Board of Education to consist of eleven members. *Acts Relating to Establishment of the District, District of Columbia Self-Government and Government Reorganization Act, D.C. Code Ann. sec. 495 (Michie 1981).*

Florida

Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require. *Fla. Const. art. IX, sec. 1.*

No person shall be deprived of any right because of race, religion or physical handicap. *Fla. Const. art. 1, sec. 2.*

Georgia

The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation. *Ga. Const. art. VIII, sec. I (Ga. Code sec. 2-4901).*

Special schools, including schools for exceptional children, are authorized. *Ga. Const. art. VIII, sec. IX (Ga. Code sec. 2-5701).*

Guam

The Governor shall provide an adequate public educational system . . . . *Guam Organic Act sec. 1421g(b).*

Hawaii

The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public education institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution. *Hawaii Const. art. X, sec. 1.*

The State shall have the power to provide for the treatment and rehabilitation of handicapped persons. *Hawaii Const. art. IX, sec. 2.*

Idaho

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools. *Idaho Const. art. IX, sec. 1.*

Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law. *Idaho Const. art. X, sec 1.*

Illinois

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has primary responsibility for financing the system of public education.[1] *Ill. Const. art. X, sec. 1.*

Indiana

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general uniform system of Common schools, wherein tuition shall be without charge, and equally open to all. *Ind. Const. art. 8, sec. 1.*

It shall be the duty of the general assembly to provide, by law for the support of institutions for the education of the deaf and dumb and blind, and treatment of the insane. *Ind. Const. art. 9, sec. 1.*

Iowa

The Board of Education shall provide for the education of all the youths of the State, through a system of Common Schools and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school as aforesaid, may be deprived of their portion of the school fund. *Iowa Const. art. IX, sec. 12.*

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[1] The legislative committee which proposed this language recognized that this language expanded the scope of education: "the objective that all persons be educated to the limits of their capacities would require expansion beyond the traditional public school programs. It recognizes the need of the person with a physical handicap or mental deficiency who nevertheless is educable." Quoted in Constitutional Commentary to Ill. Const. art. X, sec. 1 (Smith-Hurd 1971). These commentators state that this provision therefore supercedes a 1958 case which held there was no obligation to provide free school training for the mentally incompetent. In *Pierce v. Board of Educ. of Chicago*, 69 Ill. 2d 89, 12 Ill. Dec. 731 (1977), the court held that this provision is not self-enacting, and held that "*[w]*hether the Board has the duty to place the plaintiff in a special education class can only be ascertained by examining the applicable statutes and regulations. . . ."

The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. *Iowa Const. art. IX, sec. 3.*

Kansas

No tuition shall be charged for attendance at any public school to pupils required by law to attend such school. *Kan. Const. art. 6, sec. 6(b).*

The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law. *Kan. Const. art. 6, sec. 1.*

Institutions for the benefit of mentally or physically incapacitated or handicapped persons, and such other benevolent institutions as the public good may require, shall be fostered by the state, subject to such regulations as may be prescribed by law. *Kan. Const. art. 7, sec. 1.*

The legislature may levy a permanent tax for the creation of a building fund for institutions caring for those who are mentally ill, retarded, visually handicapped, with a handicapping hearing loss, tubercular or for children who are dependent, neglected or delinquent and in need of residential institutional care or treatment and for institutions primarily designed to provide vocational rehabilitation for handicapped persons. *Kan. Const. art. 7, sec. 6.*

Kentucky

The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State. *Ky. Const. sec. 183.*

Louisiana

The legislature shall provide for the education of the people of the state and shall establish and maintain a public education system. *La. Const. art. 8, sec. 1.*

Maine

A general diffusion of the advancement of education being essential to the preservation of the rights and liberties of the people to promote this important object . . . , it is the [duty of the legislature] to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools. *Me. Const. art. VIII, sec. 8.*

Maryland

The General Assembly, at its first session after the adoption of this Constitution, shall, by law, establish throughout the state a thorough and efficient system of free public schools. *Md. Const. art. VIII, sec. 1.*

Massachusetts

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the University at Cambridge, public schools and grammar schools in the towns . . . . *Mass. Const. ch. 5, sec. 2.*

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth. *Mass. Const. amend. art. CXIV.*

Michigan

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin. *Mich. Const. art. VIII, sec. 2.*

Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and means of education shall forever be encouraged. *Mich. Const. art. VIII, sec. 1.*

Institutions, programs and services for the care, treatment, education or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported. *Mich. Const. art. VIII, sec. 8.*

Minnesota

The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state. *Minn. Const. art. XIII, sec. 1.*

Mississippi

The legislature, may in its discretion, provide for the maintenance and establishment of free public schools for all children between the ages of six (6) and twenty-one (21) years. *Miss. Const. art. 8, sec. 201.*

It shall be the duty of the legislature to provide by law for the support of institutions for the education of the deaf, dumb and blind. *Miss. Const. art. 8, sec. 209.*

Missouri

[A] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state not in excess of 21 years. *Mo. Const. art. IX, sec. 1(A).*

Montana

The legislature shall provide a basic system of free quality public elementary and secondary schools. *Mont. Const. art. X, sec. 1(3).*

It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. *Mont. Const. art. X, sec. 1.*

[N]o person shall be refused admission to any public educational institution on account of sex, race, religion, creed, political beliefs or national origin. *Mont. Const. art. X, sec. 7.*

Nebraska

The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years. The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof. *Neb. Const. art. VII, sec. 1.*

[In the prohibition against appropriation of public funds to private schools, an exception is made for the education of handicapped children:] [t]he Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature. *Neb. Const. art. VII, sec. 11.*

Nevada

The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools. *Nev. Const. art. 11, sec. 2.*

New Hampshire

[I]t shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools . . . . *N.H. Const. art. 83.*

New Jersey

The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years. *N.J. Const. art. 8, sec. 4.*

New Mexico

A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained. *N.M. Const. art. XII, sec. 1.*

Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English. *N.M. Const. art. XXI, sec. 4.*

New York

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated. *N.Y. Const. art. 11, sec. 1*

North Carolina

The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students. *N.C. Const. art. IX, sec. 2(1).*

Education encouraged. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, libraries and the means of education shall forever be encouraged. *N.C. Const. art. IX, sec. 1.*

North Dakota

The Legislature shall provide for a uniform system of free public schools throughout the state.[2] *N.D. Const. art. VIII, sec. 2.*

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota. *N.D. Const. art. VIII, sec. 1.*

Ohio

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.[3] *Ohio Const. art. VI, sec. 2.*

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[2] This clause was held to give all handicapped children a right to a public school education, in *In re G.H.*, 218 N.W.2d 441 (N.D. 1974).

Oklahoma

The Legislature shall establish and maintain a system of free public schools wherein all children of the state may be educated. *Okla. Const. art. 13, sec. 1.*

The Legislature shall provide for the establishment and support of institutions for the care and education of persons within the state who are deaf, deaf and mute or blind. *Okla. Const. art. 13, sec. 2.*

Oregon

The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of common schools. *Or. Const. art. VIII, sec. 3.*

Pennsylvania

The General Assembly shall provide for the maintenance of a thorough and efficient system of public education to serve the needs of the Commonwealth. *Pa. Const. art. 3, sec. 14.*

Puerto Rico

Every person has the right to an education which shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. There shall be a system of free and wholly non-sectarian public education. Instruction in the elementary and secondary schools shall be free and shall be compulsory in the elementary schools to the extent permitted by the facilities of the state. . . . Nothing contained in this provision shall prevent the state from furnishing to any child non-educational services established by law for the protection or welfare of children. *P.R. Const. art. II, sec. 5.*

The commonwealth also recognizes the existence of the following human rights: The right of every person to receive free elementary and secondary education. *P.R. Const. art. II, sec. 20.*

Rhode Island

[I]t shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education. *R.I. Const. art. 13, sec. 1.*

South Carolina

The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable. *S.C. Const. art. XI, sec. 3.*

South Dakota

The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education. *S.D. Const. art. VIII, sec. 1.*

Tennessee

The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. *Tenn. Const. art. 11, sec. 12.*

Texas

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. *Tex. Const. art. VIII, sec. 1.*

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[3] This clause has been interpreted in *State ex rel. Core v. Green*, 160 Ohio St. 175, 115 N.E.2d 157 (1953), to give the general assembly broad powers to provide a thorough and efficient system of common schools.

Utah

The Legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State and be free from sectarian control. *Utah Const. art. X, sec. 1.*

Institutions for the Deaf and Dumb, and for the Blind, are hereby established . . . [there] shall be a perpetual fund for the maintenance of said Institutions. It shall be a trust fund . . . . *Utah Const. art. X, sec. 10.*

Vermont

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. *Vt. Const. ch. II, sec. 64.*

Virginia

The General Assembly shall provide for a system of free public elementary and secondary schools for all children throughout the Commonwealth and shall seek to ensure that an educational program of high quality is established and continually maintained. *Va. Const. art. VIII, sec. 1.*

Standards of quality . . . shall be determined and prescribed by the Board of Education, subject to revision only by the General Assembly. *Va. Const. art. VIII, sec. 2.*

The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate ages. *Va. Const. art. VIII, sec. 3.*

Virgin Islands

[No provision in Constitution].

Washington

The legislature shall provide for a general and uniform system of public schools. *Wash. Const. art. IX, sec. 2.*

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex. *Wash. Const. art. IX, sec. 1.*

West Virginia

The legislature shall provide, by general law, for a thorough and efficient system of free schools. *W. Va. Const. art. XII, sec. 1.*

The legislature . . . shall, whenever it may be practicable, make suitable provision for the blind, mute and insane, and for the organization of such institutions of learning as the best interests of general education in the State may demand. *W. Va. Const. art. XII, sec. 12.*

Wisconsin

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours. *Wis. Const. art. 10, sec. 3.*

Wyoming

The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary. *Wyo. Const. art. 7, sec. 1.*

Table II

State Constitutional Provisions for Equal Treatment

Every state constitution contains language providing equal protection of the law. Some language is modeled on the fourteenth amendment of the U.S. Constitution, and other language is distinctly different. The language listed below is quoted directly from the state constitutions. Where the language itself does not readily indicate that it mandates equal protection, a state judicial decision construing the clause as an equal protection provision is cited. As discussed in Chapter II, state courts have given varied interpretations to these clauses.

Alabama

That all men are equally free and independent; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. *Ala. Const. art. 1, sec. 1.*

That in all criminal prosecutions, the accused has a right . . . [not to] be deprived of life, liberty or property except by due process of law . . . . *Ala. Const. art. 1, sec. 6.*

That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature, and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment. *Ala. Const. art. 1, sec. 22.*

[The Supreme Court of Alabama has construed these to "combine to guarantee equal protection of the laws." *City of Hueytown v. Jiffy Chek Company*, 342 So.2d 761 (Ala. 1977).]

Alaska

This constitution is dedicated to the principles that all persons have a natural right to life, liberty and the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities and protection under the law; and that all persons have corresponding obligations to the people and the State. *Alaska Const. art. I, sec. 1.*

American Samoa

[See American Samoa Const. art. I, sec. 4.] The dignity of the individual shall be respected and every person is entitled to protection of the law against malicious and unjustifiable public attacks on the name, reputation, or honor of himself or of his family.

[No cases construing this clause were available].

Arkansas

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition. *Ark. Const. art. 2, sec. 3.*

Arizona

No laws shall be enacted granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations. *Ariz. Const. art. 2, sec. 13.*

California

All laws of a general nature shall

have a uniform operation. *Cal. Const. art. 1, sec. 11.*

No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens. *Cal. Const. art. 1, sec. 21.*

The Legislature shall not pass . . . special laws in . . . cases where a general law can be made. *Cal. Const. art. 4, sec. 25.*

[These provisions have been construed to be substantially equivalent to the federal equal protection clause. *Los Angeles County v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 196 P.2d 773, 781 (1948), *appeal dismissed for want of a substantial federal question*, 336 U.S. 929 (1949).]

Colorado

No person shall be deprived of life, liberty or property, without due process of law. *Colo. Const. art. II, sec. 25.*

[The Colorado Supreme Court has held that the fourteenth amendment's guarantee of equal protection of the law "exists within the [Colorado] constitution's due process clause." *Lujan v. Colorado State Board of Educ.*, ___ P.2d ___ (Colo. 1982) (slip. op. at 12-13).]

Connecticut

No persons shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex. *Conn. Const. amend. art. V.*

Delaware

All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law. *Del. Const. art. I, sec. 9.*

District of Columbia

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *U.S. Const. amend. XIV, sec 1.*

Florida

All natural persons are equal before the law and have inalienable rights. . . . No person shall be deprived of any right because of race, religion or physical handicap. *Fla. Const. art. 1, sec. 2.*

Georgia

Protection to person and property is the paramount duty of government, and shall be impartial and complete. *Ga. Const. art. I (sec. II), sec. 2-203.*

Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be varied in any particular case, by special legislation, except with free consent, in writing, of all persons to be affected thereby; and no person under legal disability to contract, is capable of such consent. *Ga. Const. art. I, sec. 2-207.*

[These provisions have been construed as "substantially equivalent of equal protection of the laws under the U.S. Constitution." *McDaniel v. Thomas*, 285 S.E.2d 156, 161 (Ga. 1981).]

Guam

No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied. *Guam Organic Act sec. 1421b(n).*

Hawaii

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. *Hawaii Const. art. 1, sec. 5.*

Idaho

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature. *Idaho Const. art. 1, sec. 2.*

Illinois

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws. *Ill. Const. art. 1, sec. 2.*

All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer. *Ill. Const. art. I, sec. 19.*

Indiana

We declare, That all men are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty and the pursuit of happiness . . . . *Ind. Const. art. 1, sec. 1.*

The general assembly shall not grant to any citizen, or class of citizen, privileges and immunities which, upon the same terms, shall not equally belong to all citizens. *Ind. Const. art. 1, sec. 23.*

Iowa

All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens. *Iowa Const. art. I. sec. 6.*

Kansas

All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness. *Kan. Const. Bill of Rights sec. 1.*

All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency. *Kan. Const. Bill of Rights sec. 2.*

[The Supreme Court of Kansas has held that these two clauses have the same effect as the equal protection clause of the fourteenth amendment, *Henry v. Bauder*, 518 P.2d 362, 364-365 (Kan. 1974)].

Kentucky

All men, when they form a social compact, are equal; and no grant of exclusive, separate emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment. *Ky. Const. sec. 3.*

[The Supreme Court of Kentucky has held that this section provides for equal protection of the laws. *City of Louisville v. Klusmeyer*, 324 S.W.2d 831, 834 (Ky. 1959)].

Louisiana

No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. *La. Const. art. 1, sec. 3.*

[Note that this clause implies only a rational basis standard for analyzing classifications.]

Maine

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof. *Me. Const. art. I, sec. 6-A.*

Maryland

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land. *Md. Const. art. 24.*

[This clause has been construed as embodying "the same concept of equal treatment" as the fourteenth amendment equal protection clause. *Attorney General of Md. v. Waldron*, 289 Md. 683, 426 A.2d 929, 940-41 (1981)].

Massachusetts

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin. *Mass. Const. art. I, sec. 1.*

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth. *Mass. Const. amend. art. CXIV.*

Michigan

All political power is inherent in the people. Government is instituted for their equal benefit, security and protection. *Mich. Const. art. 1, sec. 1.*

No person shall be denied the equal protection of the laws . . . . *Mich. Const. art. 1, sec. 2.*

Minnesota

No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers . . . . *Minn. Const. art. I, sec. 2.*

In all cases where a general law can be made applicable, a special law shall not be enacted except as provided in section 2 [pertaining to local governments]. Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. *Minn. Const. art. XII, sec. 1.*

[The Supreme Court of Minnesota has held that "[t]he standards of the equal protection clause of the Fourteenth Amendment are synonymous with the standards of equality under" these clauses. *State v. Forge*, 262 N.W.2d 341,347 n.23 (Minn. 1977)].

Mississippi

No person shall be deprived of life, liberty, or property except by due process of law. *Miss. Const. art. 3, sec. 14.*

[The Supreme Court of Mississippi treats this clause as providing the guarantee of equal protection of law. *Mississippi Power Co. v. Luter*, 336 So.2d 753, 754-55 (Miss. 1976)].

Missouri

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and entitled to equal rights and opportunity under the law . . . . *Mo. Const. art. 1, sec. 2.*

Montana

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil rights on account of race, color, sex, culture, social origin or condition or political or religious ideas. *Mont. Const. art. II, sec. 4.*

Nebraska

All persons are by nature free and independent, and have certain inalienable rights; among those are life, liberty and pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed. *Neb. Const. art. I, sec. 1.*

There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment, and descent of property may be regulated by law. *Neb. Const. art. I, sec. 25.*

The Legislature shall not pass local or special laws . . . . Granting to any corporation, association, or individual any special or exclusive privileges immunity or franchise whatever; . . . In all other cases where a general law can be made applicable, no special law shall be enacted. *Neb. Const. art. III, sec. 18.*

[The Supreme Court of Nebraska has referred to the state constitution's provisions as "comparable and complementary" to the equal protection clause of the fourteenth amendment. *Botsch v. Reisdorff,* 193 Neb. 165, 226 N.W.2d 121, 124 (1975)].

Nevada

All men are by nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and pursuing and obtaining safety and happiness. *Nev. Const. art. 1, sec. 1.*

[A]ll laws shall be general and of uniform operation throughout the state. *Nev. Const. art. 4, sec. 21.*

[These two clauses provide guarantees of equal protection of the laws, like the fourteenth amendment. *Laakonen v. Eighth Judicial District Court,* 538 P.2d 574, 575 (Nev. 1975)].

New Hampshire

All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good. *N.H. Const. art. I.*

[This clause has been interpreted as providing "equal protection of the laws" by the Supreme Court of New Hampshire in *Opinion of The Justices,* 387 A.2d 333 (N.H. 1978)].

New Jersey

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin. *N.J. Const. art. I, sec. 5.*

New Mexico

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. *N.M. Const. art. II, sec. 18.*

[This has been construed to be the same as the federal equal protection clause. *Garcia v. Albuquerque Pub. School Bd.*, 622 P.2d 699 (N.M. Ct. App. 1981)].

New York

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. *N.Y. Const. art. 1, sec. 11.*

North Carolina

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion or national origin. *N.C. Const. art. 1, sec. 19.*

North Dakota

All laws of a general nature shall have a uniform operation. *N.D. Const. art. I, sec. 22.*

[This clause was treated as an equal protection clause, and was held to give handicapped children the right to "an equal educational opportunity." *In re G.H.*, 218 N.W.2d 441 (N.D. 1974)].

Ohio

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly. *Ohio Const. art. I, sec. 2.*

Oklahoma

All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry. *Okla. Const. art. 2, sec. 2.*

No person shall be deprived of life, liberty, or property, without due process of law. *Okla. Const. art. 2, sec. 7.*

[These clauses have been recognized as equal protection provisions. *See Elliott v. City of Oklahoma City*, 471 P.2d 944, 945 (Okla. Crim. App. 1970)].

Oregon

No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens. *Or. Const. art. I, sec. 20.*

Pennsylvania

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any right. *Pa. Const. art. 1, sec. 26.*

Puerto Rico

The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist. No person shall be deprived of his liberty or property without due process of law. No person in Puerto Rico shall be denied the equal protection of the laws . . . . *P.R. Const. art. II, sec. 7.*

Rhode Island

All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. *R.I. Const. art. 1, sec. 2.*

[The Supreme Court of Rhode Island has interpreted this clause to be "essentially a guarantee of equal protection of the laws." *Sweetman v. Town of Cumberland*, 364 A2d 1277, 1288 (R.I. 1976)].

South Carolina

The privileges and immunities of citizens of this State and of the

United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law nor shall any person be denied the equal protection of the laws. *S.C. Const. art. I, sec. 3.*

South Dakota

No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities upon which the same terms shall not equally belong to all citizens or corporations. *S.D. Const. art. VIII, sec. 18.*

Tennessee

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land. *Tenn. Const. art. 1, sec. 8.*

The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provision of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested. *Tenn. Const. art. II, sec. 8.*

[The Supreme Court of Tennessee has treated these two provisions as providing equal protection guarantees. *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980)].

Texas

Equality under the law shall not be denied or abridged. *Texas Const. art. I, sec. 3(a).*

Utah

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require. *Utah Const. art. I, sec. 2.*

Vermont

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men who are a part only of that community; and that community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal. *Vt. Const. ch. I, art. 7.*

[This clause has been interpreted by the Supreme Court of Vermont as providing "the mandate of equal protection under the law." *Veilleux v. Springer*, 300 A.2d 620, 624 (Vt. 1973)].

Virginia

That no person shall be deprived of his life, liberty, or property without due process of law; . . . that the right to be free from any governmental discrimination on the basis of religious conviction, race, color, sex or national origin shall not be adridged . . . ." *Va. Const. art. I, sec. 11.*

That all men are by nature equally free and independent and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. *Va. Const. art. I, sec. 1.*

Virgin Islands

No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws. *V.I. Revised Organic Act sec. 3.*

Washington

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations. *Wash. Const. art. I, sec. 12.*

[Also, discrimination in education is forbidden.] It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex. *Wash. Const. art. IX, sec. 1.*

West Virginia

The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay. *W. Va. Const. art. III, sec. 17.*

[This clause was interpreted as an equal protection provision in *O'Neil v. City of Parkersburg*, 237 S.E.2d 504 (W.Va. 1977)].

Wisconsin

All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. *Wis. Const. art. 1, sec. 1.*

[The Court of Appeals of Wisconsin has stated that "[t]he protection afforded by this provision is substantially equivalent to the due process and equal protection clauses of the fourteenth amendment to the United States Constitution." *Yotvat v. Roth*, 95 Wis. 2d 357, 290 N.W.2d 524, 528 n.1 (Wis. App. 1980)].

Wyoming

All laws of general nature shall have a uniform operation. *Wyo. Const. art. 1, sec. 34.*

[The Supreme Court of Wyoming has recognized that this provision is equivalent to the equal protection clause of the fourteenth amendment. *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310, 332 (Wyo. 1980)., *cert. denied*, 449 U.S. 824 (1980).]

Table III

The Right to an Appropriate Education Under State Statutes

This table shows whether a state special education statute provides on its face that the handicapped child is to receive *either* an "appropriate" or "individualized" education. An answer of "yes" also includes similar language, such as, "commensurate with their abilities and needs" (Arizona), or to "meet the needs and maximize the capabilities of handicapped children" (Arkansas).

"Implied" refers to language which is more ambiguous, such as, "a quality program" (Georgia), "suitable" (New Jersey, Connecticut), or "proper" (Pennsylvania), etc. The line between the first and second categories is sometimes not completely clear. "Implied" refers to more open-ended concepts that permit a wide range of legal interpretations, whereas the concept of "appropriate" has become the subject of extensive federal litigation, as discussed in Chapter II.

It should be noted that even with a "No" answer, handicapped children may be currently entitled to an "appropriate" education on the basis of existing *administrative* regulations or judicial interpretation.

Alabama

Yes. "Each school board shall provide not less than 12 consecutive years of appropriate instruction and special services for exceptional children." Ala. Code sec. 16-39-3 (1975).

Alaska

Yes. If a parent believes the educational assessment of his child is wrong, a hearing shall be held "to determine the appropriate educational program placement for the exceptional child." Alaska Stat. secs. 14.30.191(c), 14.30.231 (1975).

But, see Alaska Stat. sec. 14.30.180 (1975) which states that the purpose of the statute is "to provide competent education services for the exceptional children in the state . . . ."

American Samoa

Yes. It is the "policy of American Samoa government . . . to provide appropriate means for educating children with handicapping conditions." A.S. Code tit. X, sec. 16.1602 (1981).

Arkansas

Yes. "It shall be the policy of this State to provide and to require school districts to provide, as an integral part of the public schools, special education sufficient to meet the needs and maximize the capabilities of handicapped children." Ark. Stat. Ann. sec. 80-2116 (1980).

Arizona

Yes. "All handicapped children shall receive special education programming commensurate with their abilities and needs." Ariz.

Rev. Stat. Ann. sec. 15-763 (1981 Spec. Pamphlet).

California

Yes. "[A]ll individuals with exceptional needs have a right to participate in free appropriate public education . . . ." This section also recognizes that special instruction and services for these persons "are needed in order to ensure them of the right to an appropriate educational opportunity to meet their unique needs." Cal. Educ. Code secs. 56000, 56001 (West Supp. 1982).

Sec. 56001(e) requires "a written individualized education program" for every exceptional individual.

Colorado

Yes. "Each child . . . shall be provided with an individual educational program which shall be developed in accordance with requirements established by the state board of education and shall be reviewed annually." Colo. Rev. Stat. sec. 22-20-108(4) (Supp. 1981). *See also* sec. 22-20-106(3).

Connecticut

Implied. " 'Special education' means special classes, programs or services including related services designed to meet the educational needs of exceptional children." Conn. Gen. Stat. Ann. sec. 10-76a(d) (West Supp. 1981). Each local school board shall "prescribe suitable educational programs for eligible children . . . ." Conn. Gen. Stat. Ann. sec. 10-76d(a) (West Supp. 1981).

See also Conn. Gen. Stat. Ann. sec. 10-76h(e) (West Supp. 1981) which provides that the appeal hearing board has authority "to determine the appropriateness of an educational placement" when the parent disagrees with the placement team about the child's placement.

Delaware

Yes. "The State shall provide . . . that each handicapped person as defined in this chapter shall receive a free and appropriate public education designed to meet his or her needs." Del. Code Ann. tit. 14, sec. 3120 (1981).

District of Columbia

Implied. "The public schools of the District of Columbia shall provide an adequate, publicly supported education for all students, including handicapped children for whom the regular program of instruction is inadequate to meet their special educational needs." Rules of the Board of Education, ch. 4. sec. 450.1 (1977).

Florida

Yes. The local board must "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional children." Fla. Stat. Ann. sec. 230.23(4)(m) (West Supp. 1981).

Georgia

Implied. "[E]very child and youth eligible for special education services shall have access to a quality program . . . ." Ga. Code Ann. sec. 32-605a(3) (1980).

The general education statute states that it is "the policy of the State of Georgia to assure that each Georgian has access to quality instruction designed to develop his capacities to the maximum through programs that meet his developmental and educational needs." Ga. Code Ann. sec. 32-603a (1980).

Guam

Yes. "It is and shall be the duty of the various branches and division of the public school system of Guam to offer free and appropriate educational and training services and opportunities to all children of school age whether normal, gifted or handicapped regardless of the degree of the handicap." Guam Gov't Code sec. 11980 (1976).

Hawaii

Implied. "This program shall include boarding facilities, when necessary, special classes in schools or homes, and such other facilities as shall be required to render appropriate services to the exceptional child." Hawaii Rev. Stat. sec. 301-22 (1976).

Idaho

No. However, Idaho Code sec. 33-2201 (1981) states that "[e]ach public school district is responsible for and shall provide for the education and training of exceptional pupils resident therein."

Idaho Code sec. 33-2002 (1981) defines exceptional children as "those children whose handicaps, or whose capabilities, are so great as to require special education and special services in order to develop to their fullest capacity."

Illinois

Yes. "Such rules shall ensure that a free appropriate public education be available to all handicapped children as defined . . . ." Ill. Ann. Stat. ch. 122, sec. 14-8.02 (Smith-Hurd Supp. 1981).

Indiana

Yes. "The school corporation in which a handicapped child resides is primarily responsible for providing the handicapped child with an appropriate special education program." Ind. Code Ann. sec. 20-1-6-14(a) (Burns Supp. 1981).

Iowa

Yes. "It is the policy of this state to provide and to require school districts to make provision, as an integral part of public education, for special education opportunities sufficient to meet the needs and maximize the capabilities of children requiring special education." Iowa Code sec. 281.2(2) (1981).

"Every child requiring special education shall, if reasonably possible, receive a level of education commensurate with the level provided each child who does not require special education." A division of special education in every area education agency has responsibility for identifying the children, insuring that each child receives an "appropriate special education," and related duties. Iowa Code sec. 273.5 (1981).

See also Iowa Code sec. 280.8 (1981) (duty of local district to provide education "appropriate" to child's handicap).

Kansas

Yes. "It is the purpose and intention of this act to provide for educational opportunities which will contribute to the development of each exceptional child in this state in accord with his or her abilities and capacities." Kan. Stat. Ann. sec. 72-961 (1981).

Kentucky

Yes. " 'Special education' means specially designed instruction to meet the unique needs of a handicapped child." Ky. Rev. Stat. Ann. sec. 157.200 (Supp. 1980).

See also Ky. Rev. Stat. Ann. sec. 157.224 (Supp. 1980) which states that "[t]he Commonwealth of Kentucky is committed to providing a comprehensive educational program for its exceptional school age children. . . . The rate at which new exceptional units are funded indicates the state's ability to assure a quality educational opportunity for appropriate students in existing, locally operated, exceptional class units."

Louisiana

Yes. "It is and shall be the duty of state, city and parish public school systems of the state of Louisiana to provide an appropriate, free, publicly supported education to every exceptional child who is a resident therein." La. Rev. Stat. Ann. sec. 17:1941 (West Supp. 1982).

Maine

Yes. "It is the declared policy of the State that all children be provided with equal educational opportunities. . . . Educational opportunities for such children shall be provided by means of the addition of appropriate supportive assistance to regular educational programs." Me. Rev. Stat. Ann. tit. 20, sec. 3121(1) (Supp. 1981).

Maryland

Yes. "Appropriate special educational services and compensatory special educational services are to begin as soon as an individual can benefit from them, whether or not he is of regular school age." Md. Educ. Code sec. 8-402(b) (Cum. Supp. 1981).

See also Md. Educ. Code sec. 8-415(a) (Cum. Supp. 1981) which allows parents to request review of placement decisions "or [of] the provision of a free appropriate public education for the child."

Massachusetts

Yes. The state department of education shall promulgate regulations, including definitions, in order "to assure the maximum possible development of a child with special needs . . . ." Mass. Gen. Laws Ann. ch. 71B, sec. 2 (West Supp. 1981).

Michigan

Yes. Every "local school district shall provide special education programs and services designed to develop the maximum potential of each handicapped person in its district [for ages 0 through 25] . . . for whom an appropriate educational or training program can be provided in accordance with the intermediate school district special education plan . . . ." Mich. Comp. Laws Ann. sec. 380.1751(1) (Supp. 1981).

Minnesota

Yes. "Every district shall insure that: (a) All handicapped children are provided the special instruction and services which are appropriate to their needs . . . ." Minn. Stat. sec. 120.17(3a)(a) (1980).

Mississippi

Yes. "[T]he provision of a free appropriate public education to the child." Miss. Code Ann. sec. 37-23-11 (Cum. Supp. 1981).

Missouri

Yes. "[I]it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children . . . special educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children." Mo. Ann. Stat. sec. 162.670 (Vernon Supp. 1982).

Montana

Yes. The superintendent of public instruction shall promulgate "policies needed to assure a free and appropriate public education." Mont. Code Ann. sec. 20-7-402(e) (1981).

Nebraska

Yes. Each local plan for the provision of special education programs shall include "[a] description of the procedures used to insure that students are placed in appropriate educational programs. Such procedures shall be reviewed for approval by the State Department of Education." Neb. Rev. Stat. secs. 43-649(6) (1978).

See also Neb. Rev. Stat. sec. 43-641 (1978). "The Legislature desires to reaffirm its position that all children in the state of Nebraska, regardless of physical or mental capacity, are entitled to a meaningful educational program."

Nevada

No. The state provides sufficient money "to insure a reasonably equal educational opportunity to handicapped minors residing in Nevada." Nev. Rev. Stat. sec. 388.450(1) (1979).

New Hampshire

Yes. "Each child . . . shall be entitled to attend an approved program which can implement the child's individualized education plan." N.H. Rev. Stat. Ann. sec. 186-C:9 (Supp. 1981).

New Jersey

Implied. "It shall be the duty of each board of education to provide suitable facilities and programs of education for all the children who are classified as handicapped under this chapter except those so mentally retarded as to be eligible for day training . . . ." N.J. Stat. Ann. sec. 18A:46-13 (West Supp. 1981).

New Mexico

Implied. School districts are required "to provide special education sufficient to meet the needs of all exceptional children unless otherwise provided by law." N.M. Stat. Ann. sec. 22-13-5 (Supp. 1981).

New York

Yes. "[E]ach school district shall be required to furnish suitable educational opportunities for handicapped children by one of the special services. . . . The need of the individual child shall determine which of such services shall be rendered. . . . The board shall select the most reasonable and appropriate special service or program for such children . . . ." N.Y. Educ. Law sec. 4402.2 (McKinney 1981).

A "child with a handicapping condition" is defined as one "who, because of mental, physical or emotional reasons can receive appropriate educational opportunities from special services and programs . . . ." N.Y. Educ. Law sec. 4401.1 (McKinney 1981).

Local district committees on special education must inform parents of "plans to modify or change the identification, evaluation, or educational placement of the child or provision of a free appropriate public education to the child . . . ." N.Y. Educ. Law sec. 4402.1.b(3)(c) (McKinney 1981).

Children residing in child care institutions are also "entitled to receive a free and appropriate public education." N.Y. Educ. Law sec. 4002.1 (McKinney 1981).

North Carolina

Yes. "[T]he state has a duty to provide them with a free appropriate public education." N.C. Gen. Stat. sec. 115C-107 (Curr. Supp. 1981).

North Dakota

Yes. " 'All handicapped children have the right to a free appropriate education' means that all handicapped students have the right to special education and related services which must be provided at no cost to parents." N.D. Cent. Code sec. 15-59-02.1 (1981).

Ohio

Yes. The purpose of the law is "to assure that all handicapped children of compulsory school age in this state shall be provided with an appropriate public education." Ohio Rev. Code Ann. sec. 3323.02 (Page Supp. 1981).

Oklahoma

Implied. "The several school districts of Oklahoma are hereby authorized to provide special services necessary for exceptional children . . . ." This section also contains a reference to "their individualized education program [I.E.P.]." Okla. Stat. Ann. tit. 70, sec. 13-101 (West Supp. 1981).

Oregon

Yes. If it is found in hearings about a child's contested identification, evaluation, placement or individual education plan, that "the child is not being provided a free appropriate education, the hearings officer shall decide that the school district shall revise or modify its placement in order to provide the child with a free appropriate education." Or. Rev. Stat. sec. 343.167 (1981). *See also* Or. Rev. Stat. sec. 343.221 (1981).

Pennsylvania

Implied. The state board is to prescribe standards, and local districts shall prepare plans, "for the proper education and training of all exceptional children." But, Pa. Stat. Ann. tit. 24, sec. 13-1375 (Purdon Supp. 1981) directs the state to "establish standards for the temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools." Such children then become the obligation of the

Department of Public Welfare. Pa. Stat. Ann. tit. 24, secs. 13-1372(1), (2) (Purdon Supp. 1981).

The administrative regulations expressly require an appropriate education.

Puerto Rico

Yes. "The educational services of this program shall be provided to minors under 21 years of age and shall be given until the student has completed the educational program appropriate to his condition." P.R. Laws Ann. tit. 18, sec. 1333 (Supp. 1980).

Sec. 1340(c) requires an individualized education program for each child.

Rhode Island

Implied. "The school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child." R.I. Gen. Laws sec. 16-24-1 (1981).

South Carolina

Yes. "[I]t is necessary and proper to provide an appropriate education for all handicapped children." S.C. Code secs. 59-33-10, 59-33-50, 59-33-90 (1976 and Cum. Supp. 1981).

Sec. 59-33-50 requires that "each school district shall . . . establish and operate a program which will insure an appropriate education for each handicapped child within the district . . . ."

South Dakota

Yes. "It shall be the responsibility of the school board to provide all of its resident exceptional children with an appropriate educational program." S.D. Comp. Laws Ann. sec. 13-37-14.1 (1975).

Tennessee

Yes. "It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and maximize the capabilities of handicapped children." Tenn. Code Ann. sec. 49-2912 (Cum. Supp. 1981).

"[T]o the end that they shall receive the benefits of a free public education appropriate to their needs." Tenn. Code Ann. sec. 49-2913 (1977).

Texas

Yes. "The commissioner of education . . . shall develop . . . a statewide design for the delivery of services to handicapped children in Texas . . . so that a free appropriate public education is available to all handicapped children . . . ." Tex. Educ. Code Ann. tit. 2, sec. 16.104(1) (Vernon Supp. 1981).

Utah

Yes. It is the duty of all local school districts to provide "an appropriate program of special instruction, facilities and related services for all handicapped children." Utah Code Ann. sec. 53-18-2 (1953).

Vermont

Yes. Within the limits of funds made available. Vt. Stat. Ann. tit. 16, sec. 2944(a) (Supp. 1981).

"It is hereby declared to be the policy of the state to provide equal educational opportunities for all children in Vermont . . . to provide the special educational facilities and instruction which are necessary to meet the needs of handicapped children." Vt. Stat. Ann. tit. 16, sec. 2941 (1968).

Virginia

Yes. "The program developed by the Board of Education shall be designed to ensure that all handicapped children have available to them a free and appropriate education, including special education designed to meet the reasonable educational needs of such children." Va. Code sec. 22.1-214(A) (Supp. 1981).

Virgin Islands

Yes. "The Department of Education shall be responsible for insuring that: (a) a free appropriate public education is available to all handicapped children between the ages of three and twenty-one . . . ." V.I. Code Ann. tit. 17, sec. 287(a) (1982).

Washington

Yes. "The superintendent of public instruction shall require each school district in the state to insure an appropriate educational opportunity for all handicapped children of common school age. . . . [A]n appropriate education is defined as an education directed to the unique needs, abilities, and limitations of the handicapped children." Wash. Rev. Code sec. 28A.13.010 (1981).

West Virginia

Implied. County boards of education shall maintain special education programs for all exceptional children, and shall provide for educating them "to the extent that they cannot be educated safely or profitably in the regular classes of the public schools or to the extent that they need special educational provisions within the regular classroom in order to educate them in accordance with their capacities, limitations and needs." W.Va. Code sec. 18-20-1 (Supp. 1981).

Wisconsin

Yes. "Each school district shall ensure that appropriate special education programs are available to children with exceptional educational needs . . . ." Wis. Stat. Ann. sec. 115-85(1) (West Supp. 1981).

Wyoming

Yes. "[E]very child of school age . . . having a mental, physical or psychological handicap . . . shall be entitled to and shall receive a free and appropriate education in accordance with his capabilities." Wyo. Stat. sec. 21-14-101 (1977).

Table IV

A Comparison of State Special Education Statutes

		Are Related Services Defined?	Provision for Private School Placement	Requirement of Least Restrictive Environment	
Alabama	Ala. Code sec.16-39-1 *et seq.* (1975 & Cum. Supp. 1981)	X	X	X	AL
Alaska	Alaska Stat. sec. 14.30.180 *et seq.* (1975 and Supp. 1981)	X	*		AK
American Samoa	A.S. Code tit. X, sec. 16.1601 *et seq.* (1981)	*		X	AS
Arizona	Ariz. Rev. Stat. Ann. sec. 15-761 *et seq.* (1981 Spec. Pamphlet)	*	X	X	AZ
Arkansas	Ark. Stat. Ann. sec. 80-2101 *et seq.* (1980 & Cum. Supp. 1981)	*	X	X	AR
California	Cal. Educ. Code sec. 56000 *et seq.* (West Supp. 1982)	X	X	X	CA
Colorado	Colo. Rev. Stat. sec. 22-20-101 *et seq.* (1973 and Supp. 1981)			X	CO
Connecticut	Conn. Gen. Stat. Ann. sec. 10-76a *et seq.* (West 1958 & Supp. 1981)	X	X		CT
Delaware	Del. Code Ann. tit. 14, sec. 3101 *et seq.* (1981)	X	X		DE
District of Columbia	The special education law is found in *Rules of the Board of Education* Chapter 4, secs. 450-457 (September 21, 1977)		X	X	DC

Florida	Fla. Stat. Ann. sec. 230.23(4)(m) (West Supp. 1981)	X	X	X	FL
Georgia	Ga. Code Ann. sec. 32-605a (1980)		X		GA
Guam	Guam Gov't Code sec. 11980 *et seq.* (1976)		X	X	GU
Hawaii	Hawaii Rev. Stat. sec. 301-21 *et seq.* (1976 & Supp. 1981)	X			HI
Idaho	Idaho Code sec. 33-2001 *et seq.* (1981)	X			ID
Illinois	Ill. Ann. Stat. ch. 122, sec. 14-1.01 *et seq.* (Smith-Hurd Supp. 1981)	X	X	X	IL
Indiana	Ind. Code Ann. sec. 20-1-6-1 *et seq.* (Burns Supp. 1981)	*	X		IN
Iowa	Iowa Code secs. 273.1, 281.1 *et seq.* (1981)	*	X	X	IA
Kansas	Kan. Stat. Ann. sec. 72-961 *et seq.* (1981)	X	X		KS
Kentucky	Ky. Rev. Stat. Ann. sec. 157.200 *et seq.* (19[illegible] & Cum. Supp. 1980)	X	X		KY
Louisiana	La. Rev. Stat. Ann. sec. 17:1941 *et seq.* (West Supp. 1982)	X	X	X	LA
Maine	Me. Rev. Stat. Ann. tit. 20, sec. 3121 *et seq.* (1964 & Supp. 1981)	*	X	X	ME

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*Indicates the provision is "implied" from the statutory language.

Notes

Where the term "special services" is defined, that is treated as synonomous with "related services" for purposes of this tabulation.

It should be noted that even when this table shows a particular provision is not in the statute, handicapped children may nonetheless be entitled to it on the basis of existing administrative regulations or judicial interpretation.

Table IV (cont.)

		Are Related Services Defined?	Provision for Private School Placement	Requirement of Least Restrictive Environment	
Maryland	Md. Educ. Code Ann. sec. 8-401 *et seq.* (1978 & Cum. Supp. 1981)	X	X		MD
Massachusetts	Mass. Gen. Laws Ann. ch. 71B (West Supp. 1981)	X	X	*	MA
Michigan	Mich. Comp. Laws Ann. sec. 380.1701 *et seq.* (Supp. 1981)				MI
Minnesota	Minn. Stat. sec. 120.17 (1980 & Supp. 1981)		X	X	MN
Mississippi	Miss. Code Ann. sec. 37-23-1 *et seq.* (1972 & Cum. Supp. 1981)		X		MS
Missouri	Mo. Ann. Stat. sec. 162.670 *et seq.* (Vernon Supp. 1982)	*	X	X	MO
Montana	Mont. Code Ann. sec. 20-7-401 *et seq.* (1981)	*	X	X	MT
Nebraska	Neb. Rev. Stat. sec. 43-601 *et seq.* (1978 & Supp. 1980 & 1981)	X	X		NB
Nevada	Nev. Rev. Stat. secs. 388.440 *et seq.*, 395.001 *et seq.* (1979 & Supp. 1981)		*		NV
New Hampshire	N.H. Rev. Stat. Ann. 186-C:1 *et seq.* (Supp. 1981)	X	X		NH
New Jersey	N.J. Stat. Ann. sec. 18A:46-1 *et seq.* (West 1968 & Supp. 1981)		X		NJ

New Mexico	N.M. Stat. Ann. sec. 22-13-5 *et seq.* (Supp. 1981)		X		NM
New York	N.Y. Educ. Law sec. 4401 *et seq.* (McKinney 1981 & Supp. 1981)	X	X	*	NY
North Carolina	N.C. Gen. Stat. sec. 115C-111 (Cum. Supp. 1981)	X	X	X	NC
North Dakota	N.D. Cent. Code sec. 15-59-01 *et seq.* (1981)	X	X		ND
Ohio	Ohio Rev. Code Ann. sec. 3323.02 *et seq.* (Page Supp. 1981)	X		X	OH
Oklahoma	Okla. Stat. Ann. tit. 70, sec. 13-101 *et seq.* (West 1972 & Supp. 1981)	*	X	*	OK
Oregon	Or. Rev. Stat. sec. 343.035 *et seq.* (1981)	X	X		OR
Pennsylvania	Pa. Stat. Ann. tit. 24, sec. 13-1371 *et seq.* (Purdon 1962 & Supp. 1981)	*	X		PA
Puerto Rico	P.R. Laws Ann. tit. 18, sec. 1331 *et seq.* (Supp. 1980)	*	X		PR
Rhode Island	R.I. Gen. Laws sec. 16-24-1 *et seq.* (1981)	*			RI
South Carolina	S.C. Code sec. 59-33-10 *et seq.* (1976 & Cum. Supp. 1981)	X	X	*	SC
South Dakota	S.D. Comp. Laws Ann. sec. 13-37-1 *et seq.* (1975 & Supp. 1981)	*			SD

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Table IV (cont.)

		Are Related Services Defined?	Provision for Private School Placement	Requirement of Least Restrictive Environment	
Tennessee	Tenn. Code Ann. sec. 49-2902 *et seq.* (1977 & Cum. Supp. 1981)	X	X	X	TN
Texas	Tex. Educ. Code Ann. tit. II, sec. 16.104 (Vernon Supp. 1981)	X	X	X	TX
Utah	Utah Code Ann. sec. 53-18-1 *et seq.* (1953 & Supp. 1981)	*	*		UT
Vermont	Vt. Stat. Ann. tit. 16, sec. 2941 *et seq.* (1968 & Supp. 1981)		X		VT
Virginia	Va. Code sec. 22.1-213 *et seq.* (1980 & Supp. 1981)	*	X		VA
Virgin Islands	V.I. Code Ann. tit. 17, sec. 281 *et seq.* (1982)	X	X	X	VI
Washington	Wash. Rev. Code sec. 28A.13.005 *et seq.* (1981)		*		WA
West Virginia	W. Va. Code sec. 18-20-1 *et seq.* (1977 & Supp. 1981)	X		*	WV
Wisconsin	Wis. Stat. Ann. sec. 115.76 *et seq.* (West Supp. 1981)		X	*	WI
Wyoming	Wyo. Stat. sec. 21-14-101 *et seq.* (1977)	*	*		WY

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Data on all state special education statutes are stored on computer at the Law and Education Center (LEC) of the Education Commission of the States. LEC plans to update this data base periodically. LEC is able to provide approximately twenty 50-state summaries on specific aspects of these state laws. Some of these appear in the Tables in this booklet. Most are summarized in the text throughout the booklet. Tabulations on items that are not detailed in the Tables are available from LEC.

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